

# PLEAS OF THE CROWN:

OR, A  
Methodical Summary  
OF THE  
Principal Matters relating  
to that Subject.

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By Sir *Matthew Hale*, Knight, late Chief  
Justice of the King's Bench.

---

L O N D O N,

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XUM



# THE PREFACE.

**T**HERE was lately published an Impression, such as it was, of this Book without any name of Author to it, but yet was commonly given out to have been written by the late Chief Justice Sir Matthew Hale, and sold for a Book of his writing. The Original indeed was written by him many years since: but that Impression, as it seems, was, from a surreptitious and very faulty Copy, and was accordingly very faulty and corrupt throughout in many respects, what by Omissions not onely of Marginal References very frequently, but of many intire Paragraphs, whereby the Book it self is in many places mutilated, as the Reader may easily observe, pag. 19. 23. 48. 51. 57. 108. 110. 122. 183. 187. 200. 202. 203. 208. of that Impression

## The PREFACE.

*compared with this, besides divers other shorter, but not less material Notes left out in other places: what by Omissions and Mistakes of single words, sentences, and parts of sentences, and sometimes by an unskilfull critical endeavour to restore to some sense what those mistakes had made non-sense, whereby the sense is in many places maimed and broken, in some much altered, and in some expressed quite contrary to the Author's words and meaning. Instances whereof the Reader may see in pag. 2. lin. 17. p. 4. l. 1. p. 7. l. 6. p. 10. l. 17. p. 14. l. 6. p. 15. l. penult. p. 16 l. 13, &c. the like throughout the whole Book. And what by Transposition of divers matters misplaced among other things to which they have little or no affinity or relation, whereby they are not onely wanting in their proper places, but the order and coherence of those other matters among which they are interposed, is interrupted and confounded: Thus one half of the matter belonging to this Title Process, which should have been continued p. 176. is placed*  
p. 191,

## The PREFACE.

p. 191, 192, 193. under the tit. Pleas, and the greatest part of the title Principal and Accessory which should have been continued p. 196. is there left off in the midst of a sentence and placed before at p. 177. as if it was the beginning of the title: and under the same title four Paragraphs together, which belong to Accessories after, and should have been continued p. 180. where in the Original they have a connexion with what immediately preceeds and follows, are placed before at p. 179. among what belongs to Accessories before. Again, the greatest part of what belongs to the Title Clergy, and should have been continued p. 191. is placed p. 197, &c. under the tit. Arraignment. To these might be added other faults and mistakes, but these may suffice to shew the general corruption of that Impression.

And though divers of these faults and mistakes are not to be imputed to any Negligence in the Transcriber or Publisher, (whereof notwithstanding he cannot be acquitted in others) but partly to his unaquaintance with the

## The PREFACE.

Authours hand; and partly to his Ignorance of his way of writing, who frequently at the end of his Chapters or Sections used to leave more or less blank paper, and when other matter occurred, more than could be inserted in those places, did many times write the rest in some other place, where he found most room for it, and for the most part without any note of reference to it; so that it was very difficult for any, who was not well acquainted with his writings, to reduce those transpositions to their proper places; and therefore of the many Copies, which are abroad of this Book, I could never yet see any free from divers such mistakes: yet by this means (to mention no other) whether through want of skill, or of Care, or of acquaintance with the Authours hand and way of writing, both the Authour himself was much injured by the Publication in that manner, and the Reader also.

Wherefore to doe some Right to the Memory of the deceased Authour, and to the Publick, and more particularly in some sort (as far as in respect of some

## THE PREFACE.

*some circumstances was thought fit) to gratifie the Gentlemen of this honourable Profession of the Law, who possibly may take it ill to be totally deprived of the benefit of the writings of so great a Master in it, it was thought good by a friend of the Authours, (whose care the Authour desired in the Publication of his writings, after his death) to furnish the Book-Sellers with a complete Copy corrected according to the Authours Original, onely what things were therein transposed were in the Copy reduced to their proper places according to his mind.*

*To this end it is fit also that the Reader be acquainted that this Book was written many years since, about the end of the Reign of King Charles the First, or not many years after; was not by the Authour intended for the Press, not fitted for it; and as he saith in a Letter to one of his honourable Brethren, to whom he lent it, was then never read over by him since he wrote it, as the Reader may of himself perceive by some faults, which had escaped him in writing,*

## The PREFACE.

and remain uncorrected, as p. 8. l. 22. after the word Dower it is apparent that the word [saved] or some such is wanting (which in the former Impression was indeavoured to be amended, but not without diminution of the Authour's meaning) and some others, which are left to the Reader to correct according to his own judgment, a method often approved by the most judicious Criticks in the publishing of other mens writings, and for some special reasons at this time thought fit to be observed in this.

But least while we endeavour to doe Right to the Authour, we should doe wrong to his Book, the Reader must also know, that notwithstanding what hath been said, this Book hath been well accepted and esteemed by divers of the most eminent Lawyers, who much desired and obtained of the Authour himself to have Copies of it many years since. And though probably the Authour never at all read it entirely over after he wrote it, yet it is certain he many years after made divers occasional additions to it: and,  
if

## The PREFACE.

*if I be not much mistaken, he did usually carry it with him in his Circuit?*

*He hath written a large Work upon this Subject, intituled, An History of the Pleas of the Crown, wherein he shews what the Law anciently was in these matters, what Alterations have from time to time been made in it, and what it is at this day. He wrote it on purpose to be printed, finished it, had it all transcribed for the Press in his life-time, and had revised part of it after it was transcribed: but whether, or when it will be published is uncertain. In This he doth summarily relate what the Law is at this time, or rather was when he wrote it, for some Alterations it hath since received, though not many, by some late Statutes; and therefore may not onely be of use till that be published, but may also continue of good use after that is published, when ever it be, as the most proper Introduction for Students to this part of the Law that is extant, and as a Synopsis or Epitome of the most usefull part of that.*

A Table

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C. West. 1. *Coke upon W. 1.*  
C. PC. *Coke's Pleas of the Crown.*  
Com. *Plowden's Commentaries.*  
Cr. & Crom. *Crompton.*  
Dal. *Dalton's Justice.*  
Dy. *Dyer's Reports.*  
Kel. *Kelwaye's Reports.*  
Lamb. *Lanmbart's Justice.*  
S. PC. *Stamford's Pleas of the Crown.*  
4. R. *Coke's fourth Report.*  
9. R. *Coke's ninth Report.*

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1677.

*Ri. Rainsford.*

# PLEAS

OF THE

## Crown.

**T**His Treatise (is) divid-  
ed under these Consi-  
derations;

1. Of the *Kinds* of  
Offences.

2. Of the *Incidents* unto these  
Offences.

The *Kinds* of the Offences are di-  
stinguished according to the diverfi-  
ty of the Laws by which they are  
introduced, *viz.*

Offences by the Common Law.

Offences by the Statute.

Offences *by the Common Law* di-  
stinguished according to the degrees  
of the Offence.

B

Capital,

## Pleas of the Crown.

Capital.

Not Capital.

Of *Capital* Offences, they are such,

1. As are immediately against God.

2. Immediately against Man.

Those that are Offences *not Capital* by *Common Law*, as Misprisions, Maihem, Breach of the Peace, &c.Offences *by the Stat.* { Capital.  
Not Capital.

The latter are many, and not here to be treated of.

---

*Hereſie*



## Heresie.

1. **N**OW first concerning Offences  
Capital, that are *immediately*  
*against the Divine Majesty*, which  
are

{ Heresie,  
and  
{ Witchcraft.

1. Concerning *Heresie*, wherein  
considerable,

I. *What* is Heresie?

At this day all those former Acts  
which determined certain Points to  
be Heresie stand repealed; and  
though there be no express Act de-  
termining what shall be said Heresie,  
yet the Statute of 1 *El. c. 1.* direct-  
ing the High-Commission, restrains  
it.

*C. Pl. c. 3.  
St. 1 El. c. 1.*

1. To what formerly determined  
Heresie, by the Authority of the  
Canonical Scriptures.

2. To what adjudged so by the  
first four General Councils.

3. To what expressly adjudged  
B 2 Heresie

Heresie by any other General Council by expreis words of Canonical Scripture.

4. To what so determined by Parliament by assent of the Convocation.

II. Who to *judge of Heresie* :

1. The Temporal Judge cannot punish any Person for Heresie by Indictment or otherwise :

But yet incidently he may take knowledge whether a Tenet be Heresie, or not : As where by force of the *Statute of 2 Hen. 4.* now repealed, *Kesar* was committed for saying, *That though he were Excommunicate by the Archbishop, he was not so before God :* and *Warner* committed for saying, *Non tenetur solvere decimas*, and thereupon imprisoned : In a *Habeas Corpus* by the former, and a special Justification in an Action brought by the latter, adjudged neither Heresie.

2. All the *Statutes* that gave power to Arrest or Imprison for Heresie, viz. *2 Hen. 4. 15. 2 Hen. 5. 7. 5 Rich. 2. c. 5. 1 and 2 Ph.* and

M. 5 E. 4.  
Rot. 143.  
coram Rege.

M. 11 H. 7.  
R. 327. C. E.

and *Mar. c. 6.* are repealed by 1 *Edw. 6.*

## III. The way to convict of Heresie.

### 1. By the Common Law.

1. By the Archbishops and Bishops in a General Synod.

2. By the Bishop of the Diocese.

2. By the *Stat. 23 H. 8. c. 9.*

By the Archbishop in case of the assent or neglect of his Suffragan.

## IV. The Punishment of a Party convict of Heresie.

Upon Certificate of such Conviction, a Writ *De Hæretico Comburendo* granted, without which they cannot proceed to any temporal punishment.

But if after Conviction he abjure his Opinion, his life (is) saved.

But if he relapse after Abjuration, then irrecoverable.

§. But (by) the *Statute of 2 H. 5. c. 7.* all *Statutes* which introduced any Forfeiture stand repealed: Neither did the Common Law inflict any Forfeiture, because the proceeding was onely *pro salute animæ.*

## Witchcraft.

**A**T Common Law Witchcraft is punished with death, as Heresie, by Writ *De Heretico Comburendo*.

C. P. c. 6.

The Statute of 1 Jac. 12. the only Law now in force against it, and divides it into *two Degrees* :

I. Witchcraft in the *first Degree* made Felony without benefit of Clergy, including *four Species* :

1. *Invocation or Conjuraton of an Evil Spirit.*

2. *Consult, covenant with, entertain, employ, feed, or reward any Evil Spirit to any intent, (though no act be done thereupon.)*

3. *Take up any dead Person, or any part thereof, to be employed or used in Witchcraft, Charm, &c. (though not actually used or employed.)*

4. *Exer-*

4. Exercise any Witchcraft, Inchantment, Charm, or Sorcery, whereby any Person shall be killed, destroyed, consumed, or lamed in his or her Body, or any part thereof (which requires the act to be done, viz. laming, consuming, &c.)

These and all Accessary before to suffer as Felons without Clergy: But Accessories may be taken; but then they have Clergy, because not specially excluded.

II. Witchcraft in the second Degree.

1. (To) take upon them by Witchcraft, Inchantment, Charm, or Sorcery to tell where Treasure is to be found: They that take upon them to doe it, though they cannot, yet within this Law.

2. Or where Goods (lost) or stolen may be found.

3. Or to the intent to procure any Person to unlawfully take these Clauses come under the word [taking upon.]

B 4

4. Which

4. Whereby Goods or Cattell shall be destroyed ( which requires an actual destroying, and not a bare taking upon them.)

5. Or shall use Witchcraft, &c. to hurt any Person, though the same be not effected.

The Punishment of these,

1. The first Offence a years Imprisonment and Pillory.

2. The second Offence Felony: but this requires:

1. An actual conviction and Judgment for the first.

2. The second Offence must be committed after the Judgment for the first.

The like in Forgery, Transportation of Sheep, &c.

But the Consequents upon an Attainder, viz. Corruption of Blood, and loss of Dower: but during life the Lands forfeit.

And Note, a Saving against Corruption of Blood preserves the Descent; and a saving of the Land to the Heir prevents corruption of Blood.

High

9

## High Treason.

Concerning Offences *against Man* immediately distinguished in their Judgment or Event: Capital, or not Capital.

*Capital*, either by the Common Law or the *Statutes*; and these either Treason or Felonies.

Treason, either { High Treason,  
or  
Petit Treason.

High-Treason: and this though an Offence at Common Law, yet because there be some mixtures of Introductions of new Treasons by *Statute*, would be considered together.

1. Considering High Treason, it is distinguished into *four kinds*:

1. That which concerns immediately the King, or his Wife, or Children.

2. That

## High Treason.

2. That which concerns his Officers in the Administration of Justice.

3. That which concerns his Seal.

4. That which concerns his Coin.

Before we come to the Particulars, some things to be generally premised.

1. That those that have any such disability upon them, that disables them to act reasonably, cannot commit Treason, viz. *Non compos mentis*, and Infants within the Age of discretion.

And therefore if a Traytor becomes *Non compos* before Conviction, he shall not be Arraigned; if after Conviction, he shall not be executed.

C. P. fo. 4.

An Alien Enemy, committing any hostile act, dealt with as an Enemy: an Alien amy committing any Treason, a Traytor within the Law.

2. The Statute of 25 E. 3. reduced and settled all Treasons; and by that means all Treasons that were before



before are reduced, and the Stat. of 1 Ma. c. 1. reinforced the Statute 25 E. 3. and reduced all new Treasons unto the old Standard of 25 E. 3. and so all new Treasons declared between 25 E. 3. and 1 Ma. abrogated.

3. All Treason includes Felony; C. Pl. 15 therefore if the Indictment want *proditorie*, a Pardon of all Felonies discharges it.

## Now concerning the kinds of High Treason.

I. *Compassing* and imagining the death of the King, Queen, or Prince, and declaring the same by some open Deed.

I. What (is) a *Compassing* the death?

Declaring by an open act a design to Depose or Imprison the King, is an Overt act to manifest a compassing of His Death.

Calculating Nativity *de Royenté* compassing.

II. What a King?

I. A King before his Coronation,  
a King

## High Treason.

a King within this *Statute* when the Crown descends upon him.

2. A King *de facto*, and not *de jure*, a King within this Act, and a Treason against him punishable, though the right Heir get the Crown.

3. A Titular King, that is not Regnant; as the Husband of the Queen regnant, not a King within the Act. V. 1 & 2 Ph. & Ma. c. 10. but the Queen is.

4. The right Heir to the Crown, yet not in Possession thereof, is not a King within the Act.

III. What the *King's Wife*?

It extends not to a Queen Dowager.

IV. What the *eldest Son and Heir* of the King within the Act?

The second Son, after the death of the eldest, within the *Stat.*

The eldest Son of a Queen Regnant within the *Statute*.

The Collateral Heir apparent, as *Roger Mortimer*, 11 R. 2. the Duke of *York* 39 H. 6. not Son and Heir, within this Act.

V. What

V. What an *Overt act* requisite to make such compassing Treason?

1. An Overt act must be alledged in every such Indictment, and proved.

2. Compassing by bare words is not an Overt act, as appears by many temporary *Statutes* against it: 26 *H.8.c.13.* 1 *El.c.6.* 13 *El.c.1.* 14 *El.c.1.* &c. but the same set down by him in writing is an Overt act.

3. Conspiring the death of the King, and providing weapons to effect it, or sending Letters to second it; assembling People to take the King into their power; Lord *Cobham's* Case; writing Letters to a Foreign Prince inciting to Invasion; an Overt act.

4. Conspiring to levy War no Overt act unless levied, because it relates to a distinct Treason.

II. Treason *levying War* against the King.

1. A conspiring or compassing to levy War, without a War *de facto*, no Treason; but if a War levied, the Conspiratours Traytors as well

as the Actors: This appears by the Stat. 13 El. c. 1. that made such Conspiracy to levy War Treason during the Queens life.

2. A raising a Force to burn or throw down a particular Inclosure only a Riot; but if it had been to go from Town to Town, and cast in all Inclosures, *Bradshaw's Case*; or to change Religion, or to inhanche the Salaries of Labourers, a levying of War, because the End publick.

3. Joyning with Rebels *pro timore mortis, & recesserunt quam cito potuerunt*, no levying War. *Oldcastle's Case*.

4. Holding a Fort or Castle against the King's Force a levying War.

III. Treason *Adhering to the King's Enemies*, giving them Aid within the Land and without.

1. What *Adhering*?

1. Giving Aid and Comfort to them.

2. Surrender the King's Castle for reward.

2. What

## 2. What an *Enemy*?

1. The Subject of the King becoming a Rebel, he that out of the Realm succours him, this not adhering to an Enemy within this Clause.

2. An Enemy coming hostilely into *England*, shall be dealt with as an Enemy, executed by Marshal Law, or ransomed; but a Subject assisting him shall be dealt with as a Traytor.

3. The Scots invading *England* in the Queens time adjudged Enemies, though *Scotland* then in Amity. Lord *Herri's* Case.

3. *Within the Land* or without, how that Foreign Treason shall be tried.

1. At Common Law for a Foreign Treason the Indictment and Trial must be where the land lies.

2. By the Stat. 35 H. 8. c. 2. Dy. 298. which is yet in Force, it may be inquired of and tried in *B. R.* or by Commission in any County where

where the King appoints; the King's Signature may be either to the Commission or the Warrant thereof.

Treason done in *Ireland* is within that *Statute*, *Perrot's Case*.

Trot. Ab.  
p. 382.

3. By the *Stat. 28 H. 8. c. 15*. Treason upon the Sea inquirable and triable by Commission in any County; at Civil Law it must be before Lord Admiral.

#### IV. Treason, *Violation of*

1. The King's Wife extends not to a Dowager.

§. If she consent 'tis Treason in her.

2. The Prince's Wife.

§. The same Law as before.

3. The King's eldest Daughter then living.

Thus far of Treasons that relate to the King's Person and nearest Relations, wherein generally,

1. There must be an Overt act to manifest that Offence.

2. That must be made appear by manifest proof, and not by conjectures.

3. He

3. He must be lawfully attaint thereof, either by Confession, or by his Peers in his life time.

And therefore if a Person be slain in open War he forfeits nothing, neither can he be attaint in such case, but by Parliament.

2. Thus far of Treasons relating to the King immediately; now follows that which is *Interpretative Treason*.

8. *Killing* the Chancellour, Treasurer, Justice of one Bench or other, Justice in Eyre, or of Assise, or Oyer and Terminer in their place, doing their Offices.

1. This *extends* but to the Persons here named, not to the Lord Steward, Constable, or Marshal, or Lords of Parliament.

2. It *extends* to these onely doing their Office.

3. It *extends* onely to a killing, not a wounding without death.

But by *Stat. 3 H. 7. c. 14.* compassing to kill the King, or any of his Council, made Felony.

## High Treason.

## 3. Counterfeiting the Great Seal, or Privy Seal.

1. It must be an actual counterfeiting: therefore compassing to do it no Treason.

2. Affixing the Great Seal by the Chancellor without Warrant no Treason.

3. Fixing a true Great Seal to another Patent is a great Misprision, but not Treason; nor a Counterfeiting within this Statute, 2 Hen.

4. 25.

4. Aiders and Consenters to such Counterfeiting are within this Act.

5. The Counterfeiting of the Privy Signet or Sign Manual not Treason within this Act, but made so by the Statute of 1 & 2 P. P.

c. 11.

V. Treason.



V. Treason concerning the *Coins*.1. *Counterfeiting the King's Coin.*

This was Treason at Common Law, but yet the Judgment was onely as in case of Petit Treason; and this being but affirmation of the Common Law.

Vide Si Mr.  
de Mint fait  
memi alloy,  
Sec. est Treas-  
son. 3 H. 7. 20.

But where *Clipping, &c.* is made High Treason by subsequent *Statutes*, the Judgment is to be hang'd, drawn, and quartered, because introductive of new Law.

Herein considerable.

1. What shall be a *Counterfeiting*? *Clipping, Washing, and Filing* of Money for lucre or gain, any of the proper Money of the Realm, or of other Realms, allowed to be current by Proclamation, not Within this *Statute*, but made High Treason by *Stat. 5 El. c. 11.* but no corruption of Bloud, or loss of Dower.

*Impairing, Diminishing, Falsifying, scaling or lightening* the proper Money of this Realm, or the Money of any other Realm

C 2

made

made current by Proclamation, their  
Counsellours, Consenters and Aiders  
within neither of the former, but  
made Treason by the Stat. of 18 EL.  
19. but without corruption of Blood,  
or loss of Dower.

1. What his Money?

This extended onely to the pro-  
per Money of this Realm.

But now,

1. Ma. 26. Forging of Coun-  
terfeiting Money made cur-  
rent by Proclamation, is  
High Treason.

14 EL. 2. 3. Forging of For-  
eign Coin not taken here;  
Misprision of Treason in the  
Forgers, their Aiders and As-  
sistours.

And Note, the bare forging of  
the King's Coin, without ut-  
tering, is Treason. 6 H. 7.

13.

*Mes uttering de faux money fait  
deins le Realm sciant ceo estre false est  
solment Misprision de Treason, 3 H. 7.*

19. Issint Receaving, Aiding, &c.  
cestuy que ad counterfeit, Dy. 296.

Nota,

*Nemo Est, grand Misprison, Mes  
somy Misprison de Treason, & issint  
refelvo 1661*

2. The second Offence concern-  
ing Money declared Treason, is, if  
any Person bringing into the Realm  
counterfeit Money.

1. It must be Counterfeit.  
2. Counterfeit to the similitude  
of English Money.

3. Brought from a Foreign  
Realm, and therefore not from Ire-  
land barely.

4. Brought knowingly.

5. Brought in, and not barely ut-  
tered here: But if false or clipt Mo-  
ney be found in his hands, by the  
Statute *De Moneta* if he be suspici-  
ous, he may be arrested till he have  
found his Warrant.

6. He must merchandise there-  
with, or make payment thereof.

*Certain High Treason made by subse-  
quent Statutes in force.*

5 *El. c. 1.* Refusing Oath of Su-  
premacie upon the second tender.  
Treason, without corruption of blood.

## High Treason.

Extolling power of Bishop of *Rome* Premunire, 13 *El. c. 2.* Bring in Bulls, or putting in execution, or reconciling to the See of *Rome* thereby, Treason.

Bringing in *Agnus Dei*, &c. Premunire, 1 *El. c. 1. V. Dy. 282.*

§. 23 *El. c. 1.* Absolving Subjects from Obedience, or reconciling them to Obedience of *Rome*: Treason in Reconciler and Reconciled.

§. 27 *El. 2.* Priest coming into the Realm, not submitting in two days, Treason. The like for *English* in foreign Seminaries.

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*Petit*

23

## Petit Treason.

**I**S confined by Stat. 25 E. 3. to three Particulars :

1. Where a *Servant kills his Master.*

This extends to some other Cases :

1. *Servant kills his Mistress.*

2. *Servant kills his Master's Wife.*

3. Where a *Servant*, upon Malice taken during his Service, kills his Master after departure from his Service.

2. *Wife killing her Husband.*

If the Wife and a Stranger kill the Husband, petit Treason in the Wife, Murder in the Stranger.

If the Wife or Servant procure a Stranger to kill her Husband or Master, the Procurer accessory onely to Murder :

# Petit Treason.

der: But if she procure a  
Servant to doe it, Treason in  
both.

3. *Ecclesiastical Person*, Secular or  
Regular, kills Superiour.

Note, Aiders and Abettors, and  
Procurers to Petit Treason are with-  
in this Act.

V. C. P. 20.

Crom. 18.

Dal. c. 91. H.

3. Car. Dod-

dington's Case.

This Act not taken by Equity.

Yet Son kills Father or Mother,

it is Petit Treason, receiving Meats,

Drink, or Wages.

The Judgment in Petit Treason,  
for a Man to be hang'd and drawn.

Crom. 18.

A Woman to be burnt.

Whatsoever will make a Man guil-

ty or principal in Murther, will make

a man guilty or principal in Petit

Treason.

Dal. 1. 91.

But if the Servant kill the Master

upon a sudden falling out, this is

not Petit Treason, but Manslaugh-

ter.

If the Servant or Wife be of

Confederacy to kill the Husband

or Master, and be in the same

House, though not in the same

Room, they are principals and guil-

ty

Crom. 19.

Rigg's Case.

## Petit Treason.

24

ty of Petit Treason, for it is a pre-  
sence.

*Servant tue Mr. per procurement  
le Feme absent: il est Petit Treason  
in Servant, & Accessory al Petit Trea-  
son in Feme, 2. Si Estr. fait ceo per  
procurement Feme ou Servant: est  
Murder in l' Estr. & Accessory al  
Murder in Feme ou Servant. 3. Si  
Estr. fait ceo per procurement & in  
presence de Feme ou Servant: est  
Pet. Treason in Feme ou Servant, &  
Murder in l' Estr, Dy. 332, 254,  
128.*

of

*Of Felonies: and, 1. Of  
Felonies of the Death  
of a Man.*

**T**Hus far of High and Petit  
Treason.

Now for Felonies, they are ei-  
ther: by Common Law, by Sta-  
tute.

*Felonies by Common Law: and  
they are of four kinds:*

1. Such as are committed against  
the Life.

2. Such as are against the Goods  
of a Man.

3. Such as are against the Habi-  
tation of a Man.

4. Such as are against the Pro-  
tection of Publick Justice.

Felonies committed *against the  
Life* of two Natures.

1. That which is committed a-  
gainst his own Life, *Felo de se*.

2. Committed against anothers  
Life:

1. Involuntary.

1. *Per*



## **Felonies.**

27

1. *Per infortunium*, and there-  
in of *Deodands*.

2. *Per necessitatem*.

In defence of Justice.

In defence of self.

1. Voluntary, without Malice.

With Malice.

---

*Felo*

---

# *Felo de se.*

**I.** **T**He *Person* so commit it  
 1. As in other Felonies,  
 so in this, the Person  
 that commits it must be  
 of age of discretion, and  
*Compos mentis*; other-  
 wise no Forfeiture:  
 Therefore if a Lunatick,  
 during his Lunacy, a  
 Man distract by force  
 of Disease, or *Non com-*  
*pos*, kill himself, no Fe-  
 lony.

2. As in other Felonies  
 the death must ensue  
 within a year and a day  
 after the stroke, &c.

2. The *Act* may be voluntary.

Involuntary in some cases.

If *A.* assault *B.* and *B.* falling  
 down with his Knife drawn, *A.* in  
 pursuit to kill, *B.* by haste falleth up-  
 on the Knife, *A.* is *Felo de se*, and  
 forfeits his Goods.

St. P. C. 16.

Dalt. c. 92.

But

But if *B.* were standing in his Defence with his knife drawn, *A.* runs upon the Weapon and kills himself, *A.* is not *Felo de se.* C. P. C. p. 54

3. The *Conviction.*

1. If the Body can be seen, then the Conviction before Coroner, *super visum Corporis*, and not traversable.

2. If not seen, then before the Justices of the Peace, and then traversable by the Executour or Administratour. C. P. C. 55

In the same manner, if enquired in *B. R.* in the same County, traversable.

4. The *Forfeiture* :

1. When? By the Conviction.

2. How relating? To the stroke.

Therefore, Villain gives himself a mortal stroke; Lord seiseth goods; Villain dies; King shall have them.

3. Of what?

Joint things intire, all forfeited, C. P. C. 55; unless in case of Merchants.

Joint things severable, Moiety forfeit.

But

**But Joint Chattels in Husband  
and Wife, all Forfeit for this Of-  
fence of Husband.**

**Chance-**

## Chancemedley.

**F**elony for the death of another,  
either involuntary, or volun-  
tary.

*Involuntary per infortunium;*

*Ex necessitate.*

*Involuntary per infortunium.*

*Chancemedley*, where a Man do-  
ing a lawfull act, without intent of  
hurt to another, and death casually  
ensues:

As, shooting at Rovers, or at a  
Bird, or hewing a Tree, and the  
Hatchet-head flies off.

A School-master in reasonable Cr. 26.  
manner beating a Scholar, or Father  
his Son, or Master his Servant.

Doing a lawfull thing that may  
breed danger, and giving warning;  
Justing by command of the Prince.

But if the act be unlawfull, then  
death ensuing Manslaughter or Mur-  
ther.

Shooting at a Deer in anothers C. P. C. 36.  
Park, the Arrow glanceth and kil-  
leth a stander-by, Manslaughter.

Throw-

## Chancemedley.

Throwing stones, or shooting in the High-way, and death ensuing, Manslaughter.

C. P. C. 57.

But if a Man, knowing People passing by in the street, throw a stone over the Wall, Murther.

Dalt. c. 96.

Playing at Hand-sword, without command of the King, death ensuing, Manslaughter.

So that an unlawfull act, without an ill intent, Manslaughter; with an ill intent, Murther.

St. P. C. c. 15.

And this causeth forfeiture of Goods; but a Pardon of Course upon the Special matter found.

Hatchers head lies off

A School-master in reasonable

manner beating a Scholar, or Father

his son, or Master his servant.

Doing a lawfull thing that may

proceed danger, and giving warning;

Not being by command of the Prince.

But if the act be unlawfull, then

death ensuing Manslaughter or Murder.

Shooting at a Deer in another

Park, the Arrow grazeth and kill

the Deer, Manslaughter.

Throwing stones, or shooting in the

High-way, and death ensuing,

Manslaughter.

But if a Man, knowing People

passing by in the street, throw

a stone over the Wall, Murther.

Playing at Hand-sword, without

command of the King, death ensu-

ing, Manslaughter.

So that an unlawfull act, without

an ill intent, Manslaughter; with

an ill intent, Murther.

**Deodand.**

**B**UT there is a death *per infortu-*  
*nium* without the default or  
procurement of another: fall from  
a Tree, or by a Horse or Cart: and  
there the thing that occasions the  
death is Forfeited and *Deodand*:  
wherein considerable.

1. *What Forfeited as a Deo-*  
*dand.*

1. If a man fall from a Cart, or C. P. C. 58.  
from a Ship in Fresh-water, it is a  
Deodand; otherwise in Salt-wa-  
ter.

2. If an Infant under fourteen be slain by fall from a Cart, Horſe, or Mill; no Deodand; but if ſlain by a Horſe, Ox, or Bull, then a Deodand.

3. If a man kill another with any Dalt. Inst.  
Sword, a Deodand. C. 97.

2. *When* forfeited, viz.

When found by Inquisition, <sup>Dalt. c. 97.</sup>  
therefore the Jury ought to find  
D the

the price; and this is before Coroner.

3. The *Relation* of the Forfeiture is to the stroke.

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*Homicide.*

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## *Homicide ex Necessitate.*

**T**HIS of several sorts:

1. In reference to justice.
2. In defence of his Person, House, Goods.

*Homicide ex necessitate.*

§. 1. *In reference to justice*, of several kinds:

1. In execution of Justice.
2. In advancement of Justice.

*Homicide in Execution of Justice* requires certain Prescripts.

1. That the Judgment be given by one that hath Jurisdiction in the Cause.

If a Justice of Peace give Judgment in Treason, the Execution thereof Murther in Judge and Officer. *Dalt. c. 98.*

But if he give Judgment of death in Trespas, Felony in the Judge, but not in the Officer that executes it.

2. That it be done by a lawfull Officer.

Therefore if a Stranger of his *Dalt. c. 98.*

D 2 own

## Homicide ex Necessitate.

own head, or the Judge that gives the Judgment, Execute it, where it is to be done by the Sheriff, Felony.

3. That it be done pursuant to the Judgment.

St. PC. c. 4. Judgment to be hang'd, Sheriff beheads him, Felony.

2. Homicide *in advancement of Justice* in Causes.

{ Criminal.

{ Civil.

1. In Causes *Criminal*.

If a Sheriff or Bailiff, having warrant to arrest a Person indicted of Felony, and he will not obey, or suffer himself to be arrested, the Bailiff kills him, no Felony.

Dalt. c. 98. Cro. fo. 27. The same if any Person that pursues upon Hue-and-Cry, or otherwise to arrest a Felon that flies.

C. PC. 221. If a Felon arrested break away from his Conductours to Gaol, they may kill him, if they cannot otherwise take him.

But

But in this latter Case there must be a Felony done.

If a Prisoner assaults his Gaoler, and he kill the Prisoner, no Felony.

Rioters or Forcible Enterers or Detainers, standing in opposition to the Justice's lawfull warrant, and one of them slain, no Felony.

Keeper or Parker may kill Hunters, if they fly or defend themselves. Cro. fo. 28.

Champion in bñe de dñt, ou Combatant in Appele, excuse in killing the other.

2. In *Civil* Causes.

Though Sheriff cannot kill a man who flies from the execution of a Civil Process, yet if he resist the arrest, the Sheriff or his Officer need not give back, but may kill the Assailant. C. pl. c. 56.

§. So if in the arrest and striving together, the Officer kill him, no Felony.

Now touching all the former Homicides these *things observable* :

1. There must be no malice coloured under pretence of necessity ; for if it be, it alters the Case, and makes it Murther.

2. The Party that did the Fact must be arraigned, and upon *Not Guilty* pleaded, the Special Matter must be found.

3. Upon this Special matter thus found, the Party is to be dismissed without any forfeiture or pardon purchased.

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2. Thus

2. **T**HUS of Homicide *ex necessitate* in reference to Publick Justice: Others there are that are grounded upon *Private Interest* and they of two kinds:

1. *Justifiable*, and consequently inducing no forfeiture at all, nor needing pardon.

2. *Excusable*, and yet inducing a forfeiture.

1. *Justifiable*, and inducing no forfeiture, where a Person comes to commit a known Felony.

1. If a man come to burn my Dalt. c. 98.  
House, and I shoot out of  
my House, or issue out of  
my House, and kill him,  
no Felony.

2. If a Woman kill him that  
assaulteth to ravish her, no  
Felony.

3. If Thieves assault me in the  
High-way, or in my House  
to rob me, and I, or my 24 H. 8. c. 5.  
Servant kill them, no Felony  
nor forfeiture.

• But if the assault in my House were not to rob me, but to beat me, &c. there would be onely *se defendendo*, and goods forfeited, and a Pardon of course to be granted, because (they) came not to commit a known Felony; for it cannot be judged whether he meant to kill me.

Dalt. c. 98.

If one come to enter into my House, claiming Title, and I kill him, Manslaughter.

Crom. 24.

If *A.* enter wrongfully into the House of *B.* riotously and forceably, *B.* and others endeavour to fire the House, *A.* kills, Manslaughter.

*Se de-*

## *Se defendendo.*

**H**omicide *Excusable Se defendendo*, which though it save the Life, yet the Goods are forfeited; this requires these things:

1. It must be an inevitable necessity.

In case of a justifiable Homicide, as of a Thief that comes to rob me, or by an Officer resisted in Executing an Arrest, the Party need not give back to the Wall. C. P. C. f. 56.

But in this Homicide *se defendendo*, the Party that is assaulted not excused, unless he give back to the Wall. C. P. C. 57.

But if the assault be so fierce, and in such a place that giving back would endanger his life, then he need not give back. C. P. C. 57.

A man fights, and falls to the ground, then flying not necessary. Dalt. c. 98.

2. It must be in his defence.

If *A*, be assaulted by *B*. and before a mortal wound given, *A*. gives back till he come to the Wall, and then C. P. C. 56.

# Se Defendendo.

then in his defence kills *B.* this is *Se defendendo.*

But if the mortal wound first given, then Manslaughter.

Dalt. c. 98.  
Crom. 26.

If *A.* upon malice *præpense* strike *B.* and then fly to the Wall, and there in his own defence kills *B.* this is Murther.

But if there be malice between *A.* and *B.* and *A.* strike first, *B.* retreats to the Wall, and in his own defence kills *A.* this is *Se defendendo.*

If malice be betwixt *A.* and *B.* and *A.* assaults *B.* *B.* retreats to the Wall, and then kills *A.* in his own defence; if it be in the High-way he shall be discharged, but if not, yet it is *Se defendendo.* *Copston's Case.*

*Murther.*



## Murder.

**T**HUS far of Homicide Involuntary :

Homicide *Voluntary* is either :

*Ex malitia præcogitata*, which is Murder.

*Sine malitia*, Manslaughter.

*Murder* is when a person killeth another of malice within any County in *England*, so he dye within a year and a day.

1. Who shall be said a *person killing*?

A man that is *Non compos* kills *De facto* another, this is no Felony.

§. The same for a Lunatick during his Lunacy.

But he that incites a *mad-man* to kill another is a principal Murderer.

A man *drunk* killeth another, this is Felony.

An *Infant* within age of discretion kills a man, no Felony ; as if he be 9 or 10 years old.

But if by circumstances it appear-  
eth

eth he could distinguish between  
 to Good and Evil, it is Felony: as if  
 he hide the dead, make excuses,  
 &c.

St. PC. c. 9. But in such Cases Execution in  
 prudence respited to obtain a Par-  
 don.

2. What said *Malice*?

It is either implied or expressed.

*Implied* malice is collected either  
 from the manner of doing, or from  
 the person slain, or from the person  
 killing.

1. Malice implied *in the manner*  
 of doing.

C. PC. §2. Poysoning wilfully any man, im-  
 plies malice.

Dalt. c. 93. If a man doe an act that apparent-  
 ly must introduce harm, and death  
 ensue; as to run among a multitude  
 with a Horse used to strike.

But note, that if it were with an  
 intention to doe harm, then Mur-  
 ther; if without such intention,  
 Manslaughter.

The like of throwing a stone  
 over a House among many people,  
 the intention of doing harm makes  
 it

it Murther ; want of such intention, Manslaughter, because the act unlawful.

For an Intention of evil, though not against a particular person, makes a malice.

Killing any person without provocation Murther.

A. comes to rob B. B. resists and strikes, A. kills him, Murther.

A. Distorts his mouth, and laughs at B. who thereupon kills him, Murther. M. 42, 43 EL.  
Brame's Case.

2. Malice implied *in respect of the person killed.*

If a Watchman or Constable, or any that comes in his assistance, doing their Office, be killed, it is Murther, though the killer knew not him to be such. 4 R. Hamd.  
Case, Young's  
Case.

If any Magistrate or Minister of Justice, having a lawfull Warrant, be killed, doing his Office, it is Murther: As where a Serjeant comes to Arrest,

1. Though in the Night.
2. Though on Sunday.
3. Though upon the Arrest  
he

## Murther.

9 Rep. Mack-  
ally's Case.

he shew not out of what Court, or whose Suit.

4. Though the Process Erroneous.
5. Though he shew not his Warrant or Mace where it is not demanded.

But if the Officer do what is not warrantable, as break open a window to Arrest, there though slain, Manlaughter onely, *P. 15 Car. Cook's Case.*

Malefactours come into a Park, the Parker shoots, they fly, he pursues, they kill him, Murther in all; for their first entry was with a malicious intent. *M. 17 Jac. Ufran's Case.*

3. Malice implied *in respect of the person killing.*

*A. assaults B. to rob him, B. resists, A. kills him, Murther.*

Prisoner by Durefs of the Gaoler comes to an untimely end, Murther.

Executing Martial Law in time of Peace, Murther.

2. Malice

2. Malice *Express* considerable,

1. In the principal in the first degree that doth the act.

2. In the principal in the second degree, that is present and aiding, or abetting.

3. In the Accessory before the Fact.

1. In the Principal in the first degree.

1. If a person have no particular malice against any special person, but comes with a general resolution against all Opposers, if the act be unlawfull, and death ensue, it is Murther: As if it be to commit a Riot, to enter into a Park, Lord Dacre's Case. Crom. 201

2. If there be malice between *A.* and *B.* and they meet and fight upon that malice, though *A.* gives first blow, yet if *B.* kill him, it is Murther. Crom. 211

If there be malice between *A.* and *B.* and *A.* assault *B.* and after *A.* flies to the wall, and there in his own defence kill *B.* by some this is Murther, but *Quære.* If

If there be qurrel between *A.* and *B.* and *A.* challenge *B.* *B.* declines it, but at length upon importunity, and to vindicate his Reputation, meets and fights, and kills, *A.* this is Murther, P. 14 *Jac. Taverner's Case.*

If *A.* and *B.* fall out upon a sudden, and they presently agree to fight, and each fetch a Weapon and go into the field, and one kills the other; this is onely Manslaughter, because the blood never cooled: but otherwise if they appoint to fight the next day.

*C. PC. 57. 55.*

*Lawrence  
Case. 38 El.*

*A.* and *B.* fall out, *A.* saith he will not strike, but will give *B.* a pot of Ale to touch him, *B.* strikes, *A.* kills him, Murther.

If *A.* and *B.* are in malice, and *A.* challenge the field, and *B.* refuse to meet, but he saith he shall go to morrow to such a Town, *A.* meets him, assaults him, and *B.* kills him, Manslaughter, and no Murther.

*H. 9 Jac.  
Rawly's Case.*

The Child of *A.* beats the Child of *B.* who runs home to his Father, and he runs three quarters of a mile, beats

beats the other Child, and he dies,  
Manſlaughter.

3. If malice be not continuing till  
the death, no Murther.

A. and B. combat upon malice,  
and are parted, and after they meet Crom. 21.  
and combat upon the sudden, and  
one kills the other, by some not  
Murther, because the first malice  
ſatisfied.

If the party killed had wounded  
at the first combat the party ſlaying,  
*Quere.*

A. and B. are at malice, and re-  
conciled, and after upon a new oc-  
caſion fall out and kill, no Mur-  
ther.

4. Though the malice did *not*  
*riſe ſo high* as death, but intended  
onely to beat the party, yet if ma-  
litious, it is Murther if death en-  
ſue.

A Keeper of *Eſterly* Park finds a  
Boy ſtealing wood, bound him to  
his Horſe-tail and beat him, the  
Horſe ran away, kill'd the Child,  
Murther, for it was a deliberate act,  
M. 4 Car. B. R. *Holloway's* Caſe.

E

5. The

5. The malice intended to one, *egreditur personam*, and makes the death of another upon that malice, Murther, and qualifies the act in the same manner, as if it had had its due effect.

Dy. 128.

*A.* having malice at *B.* strikes at him, and misseth, and kills *C.* this is Murther in *A.* and if it had been without malice *præpense*, Manslaughter.

Crom. 101.  
*Elly's Case.*

*A.* having malice to *B.* assaults him, and kills the Servant of *B.* this is Murther in *A.*

9 Rep. Gore's  
Case.

*A.* lays poison to kill *B.* and *C.* at misadventure takes it, and dies Murther in *A.* Contrary if it had been laid to kill *Rats*; then *infortunium*.

*A.* and *B.* combat upon malice, *C.* comes to part them, *A.* kills *C.* this is Murther, and *per ascens*, Murther in both; and if the falling out were sudden, then onely Manslaughter in him that kill'd him. Vide *Dyer* 128.  
20 *E. 3. Corone* 262.

6. The malice must be of Corporal damage to the party.

2. Prin



2. Principals in second degree, that are aiding and abetting.

1. If two or more come together to kill, rob, or beat a man, or to commit a Riot, and one of them kills a man, this is Murder in all them of that party that are present aiding or abetting him thereunto, or that were ready to aid him, though but lookers on; otherwise if he came there by chance.

St. P.C. c. 40.

2. All are said to be present that are in the same House, though in another Room, or in the same Park, though half a mile distant, and out of view; therefore if they came to commit a Felony, such persons aiding or abetting shall be said present.

34 H. 8. B.

Coron. 172.

M. 17 Jac.

Warnial's

Cafe.

Crom. 19.

Dalt. c. 93.

3. A. and B. fall out, and appoint the field; A. takes C. his Second, B. takes D. his Second; A. kills B. this is doubtless Murder in C. and it hath been held Murder in D. also, for it is a compact; but it seems otherwise.

Dalt. c. 93.

Dy. 128.

4. If A. and B. having malice *propense* meet and fight, and C. the

Crom. 100. Servant of *A.* not acquainted therewith, take part with *A.* his Master, and kill *B.* this is Murther in *A.* but onely Manslaughter in *C.*

The same Law if *C.* came in suddenly, and took part with *A.* and kill'd *B.* V. Sir *Ferdinando Cary's* Case, 14 Jac.

*Mes si un vient la per chance, & nabette, nest principal, nec accessory al Manslaughter ou Murther, Stamford.*  
40.

3. What malice in the Accessory before the Fact.

*A.* commands *B.* to kill *C.* with a Gun, he kills him with a Sword, *A.* is accessory to this Murther, because the killing was the substance.

But if he command *B.* to kill *C.* and he by mistake kill *D.* this is Murther in *B.* but *A.* is not accessory thereunto.

*A.* commands *B.* to beat *C.* who beats him, whereof he dies, this is Murther in *B.* and *A.* is accessory, because death ensues upon the act commanded.

4. What

## 4. What Killing?

Prison, Weapon, Gun, Bow, Crushing, Bruising, Smothering, Strangling, Famine, inciting Dogs.

## 5. Laying a Sick man in the cold.

Laying an Infant in an Orchard under Leaves, and he stricken with a Rife.

A man keeps a Beast used to strike knowingly, and ties it not up, the Beast kills a man, Felony by some, by others not, but a great misdemeanour, 3 E. 3. Cor. 311. St. Dal. c. 93.

## 5. What the person killed?

It must be a person in rerum natura.

If a Woman quick with Child take a potion to kill it, and accordingly it is destroyed without being born alive, a great misprision, but no Felony; but if born alive, and after dies of that potion, it is Murther.

The like if it dies of a stroke given by another in like manner.

6. Counsel before the birth to destroy it, and after the Child is born

C. PC. c. 7.  
Dal. c. 93.  
contra.

E 3      born

Ibid.

born destroyed accordingly, the Councillour is accessory.

6. What a place *within the Realm*?

Stroke and death *in partibus transmarinis* not punishable at Common

C. CP. c. 7. Law, but before the Constable and Marshal.

Stroke and death upon the Sea inquirable before the Admiral, or according to the *Stat.* of 28 H. 8. c. 13. But stroke upon the Sea, and death within the Body of the County, not punishable at all.

If the stroke in one County, and the death in another, the party shall be indicted where the death happened.

An accessory in the County of *A.* to a Felony committed in the County of *B.* the accessory after Certificate of the Conviction and Attainder of the principal, may be Arraigned upon an indictment in the County of *A.* where he was accessory. *Stat.* 2 E. 6. c. 24. V. *Formam Processus inde in B. R. C. PC. cap. 7. Overbury's Case.*

7. The

## Further.

55

7. The party must die *within the year and the day* of that stroke, or poison, &c.

E 4

Man-

# Manſlaughter.

**K**ILLING another upon a sudden falling out, or provocation, or unjustifiable act, Manſlaughter.

1. What a *sudden falling out*?

Two combat and part, and presently come together and fight, or  
 C. P. C. c. 8. one presently fetcheth a Weapon and killeth the other, or they presently fetch their Weapons, and go into the field, and one kills the other, Manſlaughter.

Divers Rioters enter into anothers house forcibly, and eject the people; afterwards they being in possession, the party ejected, with twenty more, come in the night to the house, endeavour to fire it, and one within shoots and kills one of the assailants; ruled to be Manſlaughter, because their entry and holding with force illegal, and not Murther, because a sudden provocation.

So

## Manslaughter.

57

So *A.* claims title to the house of *B.* *A.* attempts to enter and shoots at the house; *B.* shoots out and kills *A.* adjudged Manslaughter.

Two fall out and fight, and one breaks his Sword; a stranger standing by sends him another, and he kills therewith, Manslaughter in both. Dalt. c. 94.

2. What a *sudden provocation*?

Two strive for the wall, and one kills the other, Manslaughter.

3. What *unlawfull act*, whereupon death ensuing will make Manslaughter?

If the unlawfull act be deliberate, and tend to the personal hurt of any immediately, or by way of necessary consequence, death ensuing, is Murther.

But if either such deliberation or intent of personal hurt be wanting, Manslaughter.

Two play at Foils, and one kills the other, Manslaughter. *Sir John Chichester's Case*, 11 *H.* 7. 23. *V. Kell.* 108. 136. *Wrasling*, & *un autre.*

A man

A man throws a stone at another, which glanceth and killeth another, Manslaughter; and not Murther, because no malicious intent to hurt; not *per infortunium*, because doing an unlawfull act.

There is a particular Manslaughter, wherein Clergy is oust, by the Stat. 1 Jac. c. 8. wherein,

1. He that is ousted of Clergy by that Statute, must be especially indicted pursuant to the Statute.

2. It extends to him that actually gave the stroke, not to those that are present.

3. Need not Conclude *contra formam Statuti*.

4. Although the Indictment be special upon the Statute, yet the Jury may find general Manslaughter. *H. 23 Car. B. R. Page's Case.*

*A. Newgat rep. 16 Car. 2.* A man whips his horse in the street to make him run speedily, and the Horse runs over a Child, and kills him; Manslaughter: But another whips the Horse, whereby he springs out, and runs over a Child, and kills him;



*per infortunium. Nota, Indictment  
de Murther per ceo que est per infor-  
tun' sur non cul. pled. Jury poct trover  
lui non cul. si soit Coroner's Inquest  
que trove ceo per misfortune & la  
party conust ceo. Prettye's Case.*

*I come to Offence Capital  
with intent to kill  
my Person, and I say, which is  
of two kinds:*

*Simple Larceny.*

---

*Simple Larceny of two kinds:  
Grand Larceny, of the value of  
a pound.*

**Larceny.**

*Simple Larceny, a felonious and  
fraudulent taking away from any per-  
son of the goods or personal goods of  
another, not from the person, nor  
of his body, to the value of*

**Larceny.**

**W**E come to Offences Capital, which refer to *the Goods* of any Person, viz. *Larceny*, which is of two kinds ;

- { Simple Larceny,
- { ~~Mixed and complexed Larceny:~~

Simple Larceny of two kinds:  
Grand Larceny, of the value of  
12 pence.  
Petit Larceny, under that va-  
lue.

Simple Larceny, a felonious and fraudulent taking away by any person of the mere personal goods of another, not from the person, nor out of his house, to the value of 12 pence.

## I. What

I. What shall be said a *Felonious taking*? Imports two things:

1. A taking necessary; the Indictment must be *Cepit*; if it be *felonice Abduxit Equum*, not sufficient.

If a person find goods lost, and convert them, though the conversion were *animo furandi*; yet no Felony. C.P.C. >

If a man hath a *bare charge* of goods, Felony may be by him committed: As a Butler that hath charge of Plate; Shepherd of Sheep; the like of him that hath a *bare special use*, as the Guest that hath Plate set before him.

But he that hath a *possession by delivery* cannot thereof commit Felony.

A Carrier hath goods delivered to him, and he carries them away, no Felony.

A. lendeth his Horse to a Stranger, who rides away, no Felony.

A Clothier delivers Yarn to a Weaver

Weaver to weave, he carries it away, or imbezells it, no Felony.

But this hath two Exceptions:

1. If the privity be determin'd, then it may be Felony.

A. delivers a Pack or a Tun of Wine to a Carrier, he opens it, and takes out Goods or Wine, *animo furandi*, Felony.

So if A. deliver goods to B. to carry to a certain place, he carries it to the place appointed, and after takes it *animo furandi*, Felony.

2. By Stat. 21 H. 8. c. 7. whereby if a Servant goes away with the goods of his Master delivered to him above the value of 40 shillings, herein,

1. Extends not to Apprentice, nor Servants within eighteen years.

2. Requires a Delivery.

If one Servant deliver the goods to the other, this is delivery by Master.

C. P. c. 44.  
Dalr. c. 102.

If

If the Master deliver an Obligation, or deliver Cattel to sell, and the Servant receive the money and depart with it; it is no Felony; the like if he had gone away with the Obligation.

3. He must go away with it. Wastfully consuming, &c. thereof, no Felony.

4. Now by the *Stat.* of 1 E. 6. c. 12. he may have his Clergy.

5. He must be a Servant at the time of the delivery, and going away; therefore for imbezelling after Master's death, *Stat.* 33 H. 6. c. 1. gives remedy.

6. If a Servant receive his Master's Rents, and go away with them, not within the *Statute*.

If a man, seeing a Horse in the C. P. C. Pasture of the Owner, having a mind to steal him, obtains a R-plevin, and thereby hath the Horse delivered, this a Felonious taking.

If

Crom. 34.

If *A.* feloniously take my Horse, and *B.* feloniously takes him from him, *B.* may be appealed or indicted as of a felonious taking from me.

§. Stat. 33. H. 8. c. 1. False token.

*Un prist feme de I. S. oue ses biens cointre le volunt, est Felony: Contra si feme prist les biens le baron & ala oue estr. de sa bone volunt. 13 Ass. 6. Issint si feme covert prist biens le baron, ou eux dona al estr. que eux import, nest Felony. Abridg. Ass. 63.*

## II. What a carrying away?

C. P. C. c. 47.

*A.* Guest takes sheets out of the Bed, brings them into the Hall with an intent to carry them away, but is apprehended before this; a carrying away.

*A.* takes the Horse of *B.* with an intent to steal him, but is apprehended before he can get out of the Pasture; this taking away.

Crom. 33.

*A.* kills my Sheep, strips them, carries away their skins, Felony; so if he pull off their wool.

## III. By

III. *By whom?* and who such  
a person as may commit  
Larceny?

An *Infant* under fourteen years Dal. 104.  
may commit Larceny; but pru-  
dence to respite Judgment; yet  
one under fourteen burnt in the  
hand. Presidents.

A *Feme covert* by her own act  
may commit Larceny, and in such  
case the Husband may be Accessory  
to the Wife in receiving her; but  
not *converso*.

But she cannot feloniously take  
her Husband's goods; and though  
she so take her Husband's goods, and  
deliver them to a stranger, yet no  
Felony in the stranger.

If Husband and Wife doe both a Dal. 104.  
Felony, this is Felony in both, and  
both arraigned for it.

*Nota*, Books old and latter, and  
Practise, *contra*.

If the Wife commits Murther by  
coercion of her Husband, Murther  
in both; but if theft, no Felony in  
F her;

her ; but a bare Command excuseth her not.

But if a *Servant* commit theft by coercion of his Master, yet it is Felony.

#### IV. What mere *personal Goods* ?

1. If they are in the realty, or annexed thereunto, no Larceny :

Dalt. c. 47. As Corn or Grass growing, Apples on Trees.

§. Stealing a Chest of Charters, no Felony, though the Chest above value.

Taking Lead off a Church no Felony ; otherwise if he leave it a while, and after come and take it.

Taking an Infant Ward no Felony.

2. If they are of a base Nature, as Mastiffs, Dogs, Bears, Foxes, Monkeys, Ferrets, or their Whelps, there can be no Felony of them ; but of Hawks reclaimed Felony may be.

V. What



V. What said the Goods of another.

1. He that hath a special property, as a Bailiff, &c. they are his goods *pro tempore*. A. bails goods to B. and after to the intent to charge B. steals them from him, Felony in A. 21 H. 7. Kel. 70. *Cloth in maines Taylor.*

2. He that takes the goods of a Chapel in time of vacation, indictable *quare bona Capellæ*; so *bona* Dalt. 103. *Parochianorum*, *bona mortui*, or *bona ignoti*, &c.

So to steal the Shroud off a Person buried; and it shall be *bona executorum*. V. *Tamen contra*; 25 Jac. Nottingham's Case.

But taking of Treasure trove, Wrecks, Waifs and Strays before seizure, no Felony.

Taking an Obligation Felony, because in action.

Taking Fish in a River no Felony, but Fish in a Net, Trunk, or Pond, Felony, because not at their natural

F 2

liberty:

liberty : So of old Pigeons out of the House.

Where a man hath a property onely *ratione loci*, or *privilegii*, in things *feræ naturæ*, as Coneys or Deer in my Ground, Park or Warren, no Felony.

But if reduced to tameness, and fit for food, as Deer, Coneys, Cranes, Partridge, Pheasants, he that stealeth them, knowing them tame, committeth Felony.

*Mes fil ne en-  
nasant d'ee ta-  
me, nest Fel-  
ny. V.M. Char-  
m. 201.*

So of Swans marked and pinioned, or Swans unmarked if tame, kept in a Mote, Pond, or private River.

Where a man hath a property *ratione impotentie* in things wild by nature, as young Hawks in the nest, young Pigeons in the nest, Felony thereof.

Taking of Eggs of Hawk or Swan out of the Ground of another, no Felony, but punishable by *Statute*.

But taking any thing *domitæ naturæ*, as Duck, Hen, Geese, Turkeys, Peacocks, or their Eggs; or Domestick

mestick beasts, as Horses, Mares, Colts, &c. or their young, Felony.

VI. Where this shall be said a  
*felonious taking.*

If *A.* steal goods in the County of *B.* and carry them into the County of *C.* he may be appealed or indicted in the County of *C.* for Larceny, but can be indicted of Robbery onely in the County of *B.* onely in the former case the *Stat.* of 25 *H.* 8. c. 1. ousts them of their Clergy, if they were not to have had Clergy if arraigned in the County of *B.* where the Robbery committed.

*Si guesit prist sheets hors de leet feloniously, & eux import in hale, & la sur fear de poursuit relinquish eux, Felony.* 27 *Ass.* 39.

VII. Of the *value* of twelve pence or above.

1. *Nota*, That in case of Grand Larceny it must be above the value

*West. 1. p. 15. 21 Jan. c. 6.*

F 3

of

of twelve pence; and if it be but of the value of twelve pence, or under, it is Petit Larceny.

2. If two steal goods to the value of thirteen pence, this is Grand Larceny in both.

Dalt. C. 101.  
Crom. 36.  
St. P. C. 24.

3. If one person at several times, at one time steal four pence, at another six pence, at another three pence, in all amounting to above twelve pence, from the same person, all these put together in one Indictment, amount to Grand Larceny; and Judgment of death.

4. If a man be Indicted of stealing goods to the value of ten shillings, and the Jurors find specially, as they may, the value but ten pence, 'tis but petit Larceny, and no Judgment of Death.

And note, petit Larceny is Felony, though not of death; and for this he shall forfeit Goods, and be subject to whipping or other Corporal punishment. *Iffint si fugam fecit furt biens.* Coron. 106.

Robbery

## Robbery.

**C**omplicated or mixt Larceny, which hath a farther degree of guilt in it.

1. For that it is a taking from the person.

2. For that it is a taking out of the House.

1. *Taking from the person.*

1. Where the person is put in fear, and then 'tis Robbery.

2. When not put in fear, and then 'tis Larceny from the person.

*Robbery* is a felonious and violent taking away from the person of another money or goods to any value, putting him in fear.

1. *Violent and putting him in fear*; the words of the Indictment run, *violenter & felonice*, and that distinguishes him from a Cut-purse.

2. *Taking away.*

1. An assault to rob without any taken, is no Felony.

F 4

If

## Robbery.

If a Thief, with or without weapon drawn, bid the party deliver his Purse, and he doth it, this is a taking to make it Robbery.

Crom. 31.

If a Thief command to deliver his purse, and he deliver, and the Thief finding little in it, deliver it back, this is Robbery.

G. PC. c. 16.

If a Thief compell the true man by fear to swear to fetch him a sum of money, which he doth accordingly, and the Thief receives it, it is Robbery.

If the true man's purse be fastened to his girdle, the Thief cuts the girdle, the purse falls to the Ground, no Robbery; but if the Thief take up the purse, though he let it fall again, Robbery, though he never take it up more.

All that come in company to rob Principals, though one onely actually doe it.

Crom. 34.

*A. B. and C. assault D. to rob him in the High-way, but rob him not, for that he escaped: A. rides from the rest, in the same High-way, and robs E. out of view of the rest, and came*

came back to the rest, and for this B. and C. arraigned and hanged, though assented not, because they all came to the end to rob. *Pudsey's Case.*

## 3. Taking from the person.

If the true man, seeking to escape, casts his Purse into a Bush, or let fall his Hat, if the Thief take it, Robbery.

Taking a thing in my presence is in law a taking from the person.

If one take or drive my Cattel *Dalt. c. 104.* out of my Pasture in my presence, this is Robbery, if he make an assault upon me, or put me in fear.

But if he take any thing from my person, without putting me in fear by assault or violence, no Robbery; and the Indictment runs that he took it from the person violently and feloniously, putting him in fear. *Dal. ibid. Dy. 224.*

## 4. Of what value soever.

Though under twelve pence. *C. P. C. c. 16.*

*Mes in foren County in tiel case Petit. Larceny, car n'est Robbery l. 2 Jac. Moor's Rep.*

Now though Robbery and simple

ple Larceny are both Capital, yet they differ in these Respects :

1. The Principal and Accessory before are ousted of Clergy, but not in simple Larceny.

§. Stat. 23 H. 8. c. 1. 1 E. 6. 12. 25 H. 8. 3. 4 & 5 Phil. & Ma. c. 4. *Nota*, speaks of Robbery in or near the High-way.

2. In the form of the Indictment :

An Indictment of Robbery supposeth an assault, beating and wounding, and taking from the person *felonice*; or at least assault and putting in fear, *felonice & violenter cepit a persona*: Other Indictments, though of a taking from the person, yet not *violenter*.

3. In case of other Thefts though from the person, not Felony of death, unless it exceed twelve pence: But here it is Felony of death if never so small.

*Larceny.*



## *Larceny from the Person.*

**L** Arceny from the person *without putting in fear*; which may be either by picking the Pocket, or cutting the Purse, which is supposed to be done *clam & secrete à persona*.

In this Case by the *Stat. of 8 El. c. 4*. If the Indictment pursue the *Statute*, which is secretly without the knowledge of the party, *clam & secrete*, he is ousted of his Clergy.

But if it be under value of twelve pence, then it remains petit Larceny, as before; for the *Statute* did not alter the Offence, though it took a Privilege. C. P. C. c. 86.  
Crom. 103.

Larceny from the person, which is neither *clam & secrete à persona*, nor with putting in terrour, nor so laid in the Indictment, nor so found by the Jury, Clergy. *Dyer 224. 17 Jac. Harman's Case.*

*Larceny.*

## *Larceny from the House.*

**L** Arceny receives another aggravation when it is taken *from the Habitation* of a man.

Per. Stat.  
23 H. 8. c. 1.

Robbing any person in, their dwelling-house, the Owner, his Wife, or Children, or Servants being within, and put in fear, ousted of Clergy in case of Conviction, together with Accessories before, by *Stat. 23 H. 8. c. 1.*

Felonious taking of goods to the value of five shillings out of any dwelling-house or out-house, though no person within, oust of Clergy, by 39 *El. c. 15.*

These have a mark upon them as Larcenies complicated, and so oust of Clergy. V. *Infra Clergy.*

*Piracy.*

## Piracy.

**T**O this we may add Piracy and Depredation upon the Sea.

This at Common Law convicted C. P. C. 49. petit Treason, if done by a Subject.

But this alter'd by *Stat. 25 Ed. 3.*

Since that *Statute* an offence triable by the Civil Law till 28 *H. 8.* 15.

The *Stat. 28 H. 8.* alters not the offence; but it remains onely an offence by the Civil Law: and therefore a pardon of all Felonies doth not discharge it: but it gives a trial by the course of Common Law:

1. It extends not to the Accessories: but if the Accessory were at Sea, triable by the Civil Law; if at Land, by no Law: for *Stat. 2, 3 E. 6.* extends not to it.

2. It extends not to Offences in Creeks or Ports within the Body of a County, because punishable by the Common Law.

3. Though

**Piracy.**

3. Though it give forfeiture of Life, Lands, and Goods, yet no Corruption of Blood.

4. *Paine fort & dure* in case of standing mute.

**Burglary.**

## Burglary.

3. **W**E come to the offences *against the dwelling or habitation*; and that of two kinds:

1. Burglary.

2. Arson, or Burning.

*Burglary* by the Common Law is, where a person in the night-time breaketh and entreth into the Mansion-House of another, to the intent to commit some Felony within the same, whether the Felonious intent be executed or not.

I. What shall be said in the *Night*?

By some after Sun-set and before Sun-rising it is night. *Dal. c. 99.*

But it seems that so long as the Countenance of a person may be discerned it is day. *C. P. C. 14. Coron. 293.*

II. What

II. What *Breaking and Entering*?

The Entering into a House by the doors open is a Breaking in Law; but here not sufficient without an actual breaking: Therefore if the door be open, or window be open, and the Thief draw out Goods thereby, no Burglary.

But if the Thief break the window, draw the latch, unlock the door, break a hole in the wall, these are Breaking.

And as there must be a Breaking, so there must be an Entry:

Setting the foot over the threshold;

§. Putting the hand, or a hook, or a pistol within the window, or door;

Turning the key where the door is locked on the inside;

§. An Entry.

In some cases Burglary without actual breaking.

Divers

Divers come to commit Burglary, and one does it, the rest watch at the Lanes end, Burglary in all.

A Thief goes down a Chimney to rob, Burglary. *Crom. 30.*

Thieves having an intent to rob, raise Hue and Cry, and bring the Constable, to whom the owner opens the door, and when they come in, they bind the Constable and rob the owner Burglary. *C. PC. 14.*

A Thief assaults the House, the owner for fear throws out his money, it seems not Burglary, but onely Robbery.

A Thief gets in by the doors open in the day, lies there till night, then robs and goes away; no Burglary: But if he break open the door to go out, Burglary. *Dal. 99.*

The Servant opens the window to let in a Thief, who comes in and steals, Burglary in the Stranger, but Robbery in the Servant. *Dalabi supra.*

If *A.* enter into the Hall by the doors open, the owner retires to a Chamber, and there *A.* breaks in, this a Breaking and Entering.

G

If

If Thieves enter into a House through a hole made there before, no Burglary.

Trin. 16. Jac.  
Edmond's  
Case.

A. lies in one part of the House, B. his Servant in another, between them a Stair-foot-door latched, the Servant in the night draws the latch, and enters his Master's Chamber to Murther him, Burglary.

### III. What *Mansion House*?

The Church a Mansion House within the Law.

§. The Out-buildings, as Barns, Stables, are parcel of the Mansion House, and Burglary may be committed in them.

Nota, *L'use ore est, si soit un Barne ou Stable* disjoyned at any distance from the House, *nest Burglary*.

Burglary may be committed in a Mansion-house, though all persons be out upon occasion.

So if a man hath two Houses, and sometimes live in one, sometimes in another.



A Shop parcel of a Mansion house.  
A Chamber in an Inns of Court,  
where a person usually lodges, a  
Mansion-house.

But a Booth is not, and therefore  
remedy especially provided *per Stat.*  
5 E. 6. c. 9.

But an Indictment *quod fregit  
clausum ad ipsum interficiendum*, no  
Felony, for no Mansion-house.

A leases to B. a Shop, parcel of  
his House, to work in, where B.  
works in the day, which is broken,  
ruled not Burglary, because severed  
*per Lease. Trin. 17 Jac.*

## IV. With *Intent* to commit some Felony.

If the House be broken and en- C. P. C. c. 14  
tered with an intent to commit a  
Trespass, as to beat the owner, no  
Felony.

If with intent to commit a Rape;  
by some no Burglary, because no  
Felony at Common Law; but this  
seems otherwise, though the Felony  
be not done:

G 2

The

**Burglary.**

The Indictment runs, *Burglari-  
tes & felonice domum, &c. fregerunt  
vel intraverunt ad ipsum, &c. inter-  
ficiendum.*

And by the *Stat. of 18 El. c. 6.*  
Clergy taken away in all Burglary.

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*Arson.*

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# Arson.

**B**urning is Felony at Common Law by any that shall maliciously and voluntarily burn the House of another.

## Burning.

Setting fire on a House, without burning it, or any part of it, no Felony; but if part of the House be burnt thereby, it is Felony by Common Law.

## Maliciously.

*A.* intending to burn onely the House of *B.* thereby burns the House of *C.* this is Felony; and he may be Indicted, That *ex malitia præcogit* he burnt the House of *C.*

*A.* maliciously burns his own House, to the intent to burn others, but none else but his own burnt, ruled no Felony, but a great misdemeanour; upon which set in the Pillory, and bound perpetually to good behaviour. 9*Car. B. R. Haines's Case.*

• Mes si le meason d'autre p t est  
combure, est Felony.

The House.

In-set House, or Out-set House.

If parcel of the Mansion-House,  
as Stable, Mill-house, Sheep-house,  
Barn, and no Clergy.

§. But burning of a Barn, not  
parcel of a Mansion-House, if it hath  
Corn or Hay in it, Felony, other-  
wise not.

But Felon not oust of Clergy,  
unless part of a Mansion-House or  
Barn with Corn.

Burning the Frame of an House  
by 37 H. 8. attempting to burn a  
stack of Corn by 3 & 4 E. 6. made  
Felony, but both Repealed 1 Ma.

But in Northumberland, Cumber-  
land, Westmorland, and Durham,  
Felony to burn a stack of Corn by  
43 El. c. 3.

Nota, The Indictment of Burglary  
*Domum Mansionalem*; of Arson onely  
*Domum*.

Breach.

## Breach of Prison.

**N**OW we come to those Felonies that are the *hindrance of amesning a Felon to publick Justice*; And they are of three kinds in reference to the person that causeth it;

1. In the party himself:

{ Breach of Prison.

{ Escape.

2. In the Officer or person that permits it; and then

{ Voluntary,

{ Involuntary.

3. In a Stranger, that is Rescue.

1. *Breach of Prison.*

At Common Law it seems all breach of Prison Felony; but by *Stat. 1 E. 2. nullus de cetero, qui prisonam fregerit, subeat Judicium vite vel membrorum pro fractione prisonæ, nisi causa, pro qua capt' & imprisonat' fuerit, tale Judicium requirit.*

G 4

And

## Breach of Prison.

And herein these things are considerable :

1. Who may *Arrest* or Imprison?
  2. What a *Prison*?
  3. What *breaking* a Prison?
  4. What a *cause* that requires a Judgment to make this Felony?
- 

*Arrest.*

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## *Arrest.*

**1. WHO** may Arrest or Im-  
prison? This is either

1. By a private Person.

2. By a publick Officer.

1. Arrest *by a private Person*,  
and that two kinds :

1. Either commanded and en-  
joyed by Law.

2. Or permitted and allowed C. P. C. 53.  
by Law.

*Arrest commanded by Law.*

1. Persons present at the com-  
mitting of a Felony must use their  
endeavours to apprehend the Offen-  
der, otherwise they are to be fined St. P. C. 29.  
and imprisoned.

Hence it is that if a Murther be  
committed in the day in a Town  
not inclosed, the Town-ship shall be  
amerced ; if in a Walled-Town, be  
it night or day, the Town shall be  
amerced [if Offender escape.] *Stat.*

3 H. 7. 1.

So

So it seems if one strike another dangerously, though death hath not yet happened.

C. P. C. 52.

2. Upon *Hue and Cry* well levied, every man may and must arrest the Offender upon whom it is levied, by *Stat. Winchester*: and want of pursuit thereof is punishable by Fine and Imprisonment.

The manner of levying *Hue and Cry* is, where a Felony is committed, or a dangerous stroke given, resort to the Constable, declare the Fact, describe the Party and the way he is gone, who thereupon is to raise the Town, be it by night or day, and to give the next Constable warning, and he the next.

3. In aid of an Officer that hath a lawfull warrant *in fact*, or in Law, to arrest a Malefactor.

And in these cases it seems it is in the power of such private person to break the House, if upon demand he cannot be admitted to take the Offender. 7 E. 3. 16.

Dal. fo. 249.

V. Cooke Jur.  
COURT 177.

*Videtur*, 1. *Sur felony fait & just suspicion ascun poit arresster.* 2 E. 4. 8.

2. *Sur*



2. *Sur Arrest de amesner al Common Gaol*, 20 E. 4. 6. *ou deliver al Constable*, 10 E. 4. 1.

2. A *permissive* Arrest by a private person :

If a Felony in Fact be committed, and a private person suspect another upon a probable cause, he may be arrested, though in truth innocent ; And these may be *probable causes* ;

Hue-and-Cry levied ;

§. Company with the Offenders ;

§. Goods in his Custody ;

§. Living vagrantly ;

§. Common Fame.

But upon such suspicion he cannot break open the door of a House, C. Just. Comm. 179. but may enter the door being open.

The person arrested by either of these means by a private person must be brought to the Constable ; and if Constable be not to be found, Dal. fo. 414. to a Justice ; and in case of a Felony known, put in the Stocks or Common Gaol till he be brought to a Constable.

2. Arrest

2. Arrest by a publick Officer without Process of Law.

*Nota*, Whatsoever a private person may do in this case, an Officer as a private person may do.

Now these *Officers*,

1. *Constable*.

If complaint be made to a Constable of Felony committed, or of a dangerous blow given, though the party not dead; or in case there be an assault upon the Constable, or in case of any other breach of the Peace, the Constable may imprison the party in the Stocks, in the Goal, or in his House, till he can bring him before a Justice of Peace.

But if it be a bare breach of the Peace, unless it be in his view, he cannot arrest the party; but complaint must be made to a Justice of Peace, for the Constable is but a Conservatour, not Justice of Peace, unless a Felony be done.

If a Constable see an Affray, and the Malefactours fly into another County before arrest, he may pursue

find them and arrest them there, and then he must bring them before a Justice of that County where arrested.

But if the Escape was after arrest, then he may retake them in another County, and bring them to the first.

He may break open doors to take an Offender, where Felony committed, or a dangerous wound given. Dal. 78.

2. By a Justice of Peace, who upon complaint may issue out his Warrant to apprehend the party :

1. A general Warrant to search for Felons or stolen Goods, not good. *C. J. N. C. 177.*

2. If a Justice hath cause of suspicion, he may arrest as a common person, not as a Justice.

3. Upon complaint of a Felony committed, and where doubt may be of apprehending the Offender, in assistance of the party suspecting, he may grant his Warrant to the Constable to apprehend the party, but the party suspecting ought

ought be present, because it is his arrest.

But by virtue of such Warrant doors cannot be broken up.

4. But at the Sessions the Justices may award a *Capias* against the person indicted, and by virtue thereof the Sheriff may break open doors.

A party being apprehended by such Warrant, is either to be Committed, Bailed, or Discharged.

The *Commitment* by a Justice ought to be to the Common Goal by the *Stat. 23. H. 8. c. 2.* and the *Mittimus* ought to be,

C. M. Car.  
99. Stat. 3 H.  
7. c. 3.

1. Under Seal.
2. Contain the Cause.
3. Have an apt Conclusion, viz. there to stay till delivered by Law, otherwise the Warrant void.

C. P. c. 100.  
fo. 209.

And note, That a person committed for Treason, Felony, or other Crime, cannot be discharged till

till indicted and acquitted; or *Ignoramus* found, or discharged by Proclamation, or by the Kings Bench upon *Habeas Corpus*.

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*Bail.*

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# *Bail.*

**I**N order to the consideration of Arrests and Escapes, here fit to consider of Bail and Mainprise in cases of Felony.

1. What Bail is?
2. In what cases?
3. By whom?

1. *Bail* are Sureties taken by a person authorized, to appear at a day, and to answer and be justified by the Law.

The difference between Bail and Mainprise is, That Mainperners are onely Surety; but Bail is a Custody; and therefore the Bail may reseize the Prisoner if they doubt he will fly; and detain him and bring him before a Justice; and the Justice ought to commit the Prisoner in discharge of the Bail; or put him to find new Sureties: The like may be done by the Justices in case of insufficient Bail.

If

If a Justice of Peace take insufficient Bail, and the party appear not, the Justice finable by Justice of Gaol Delivery.

The *sufficiency* of the Bail in respect of their number, two at least; and those Subsidy-men in case of Felony.

And in respect of the sum, forty pounds at least.

Bail is either in a certain sum; or *corpus pro corpore*, in which case the Offender not appearing, the Surety shall not be Executed, but onely fined. 29 Affs. 44.

2. In what Cases?

1. Generally; To refuse Bail where the party ought to be bailed, the party offering the same, is finable as a Misdemeanour;

2. And admitting Bail when it ought not is punishable by the Justice of Gaol Delivery by Fine, or punishable as a negligent Escape at Common Law, *de quo infra*.

3. Particularly; At Common Law Bail in all Cases but Homicide; But now the Stat. Westm. I. c. 15.

H directs

directs in what Cases bailable, and what not.  
 At this day in all Offences below Felony, the party accused is bailable, unless  
 1. Guilty by that Statute, or some other Statute.

2. Unless Judgment be given.

Crom. 154.

If a person be brought before a Justice, if it appears no Felony be committed, he may discharge him; but if Felony be committed, though it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him.

The cases of Felony wherein the parties are not bailable, are

1. In respect of the heinousness of the Offence,

1. In a Charge of Treason against the King's Person;

2. Counterfeiting the Seal;

Dal. c. 114.

3. Falsifying Money;

4. Arson, or burning Houses;

5. In a Charge of Homicide.

6. In case of a Charge of Murder.

Justices of Peace cannot bail, but



the King's Bench may; but do not in discretion, for the *Stat. Westm. 1.* extends not to that Court. Dal. c. 114.  
V. C. super  
Stat.

2. In case of Manslaughter, though it be but *se defendendo*, and so appear to the Justices of Peace, they cannot bail the party accused:

1. If he confess the Fact upon examination; Dal. c. 114.

2. If taken with the manner, if apparently known or manifested that he killed another.

But if it be a *non liquet* that he the person, and the Charge but Manslaughter, there it seems they may bail.

So if he have given a dangerous stroke, he may be bailed till the party dead.

But such bailment where Manslaughter or other Felony is committed, must be

1. By two Justices, one of the *Quorum*.

2. After Examination, &c.

And these be all the persons excluded from bail simply, in respect of the nature of the offence: Hence 3 H. 7. c. 9.  
St. 1 & 2 Ph.  
& Ma. c. 13.

H 2

I. All

C. West. 1.  
c. 15.

St. PC. c. 18.

1. All Accessories before or after any Offence bailable; but if the Principal be attainted, and Accessory indicted, he shall not be bailed untill he hath pleaded to the Indictment.

2. Persons indicted of Larceny before the Sheriff, if of good name.

3. Imprisonment for a light suspicion, if of good name.

4. Indicted or accused of petty Larceny onely.

5. Appellee of Approver after death of Approver.

6. Accused for Trespass, for which a man ought not to lose life or member, if bail not taken away by a subsequent Stat.

Dal. c. 114.  
f. 304.

And hence also a party indicted for Burglary or Robbery may be bailed.

2. As bail is ousted in some cases, in respect of the greatness and consequence of the Offence charged, so it is in respect of the Notoriety of the Offence: For bail is, when Stat indifferenter, whether the party be guilty or no: But when that indifferency

ferency is removed, the Offender otherwiseailable is become notailable.

1. If a Person be Attaint by Utlary of any Felony, yet if the Defendant comes in and pleads in avoidance of the Utlary, be it in Appeal or Indictment, the King's Bench may bail him. West. 1. c. 15.

2. If he be convict by Verdict or Confession of any Felony, he is notailable. Dal. c. 114.

But if a man be convict of Manslaughter *se defendendo*, the Justices of B. R. or Gaol Delivery, or special Writ may bail him, but not Justices of Peace: So if he have Charter of Pardon. Dal. fo. 383.

3. He that becomes an Approver cannot be bailed.

4. He that Abjures cannot be bailed.

5. He that's taken with the manner notailable; And consequently neither he that's taken freshly upon Hue-and-Cry. *Bridge's Case.* Justice of Peace fined 40 *l.* for bailing such.

H 3

6. He

6. He that breaks Prison not bailable.

7. Open and notorious Thieves not bailable.

But he that is taken for a light suspicion bailable.

But if the Presumption be strong, or the Defamation great, the Justices may refuse to bail him: This lies in discretion.

8. Those that are appealed by Provers, unless

1. The Prover die.

2. The Prover waive his Appeal.

3. Unless he be of good name.

And the reason hereof, because when the Approver appeals another, he confesseth himself guilty, and therefore induceth a presumption of guilt in another.

But this concerns not Justices of Peace, because no man can become Approver before them, because they cannot assign a Coroner; but they may take the Confession by way of Evidence.

But

But a bare Indictment or Appeal did not induce such a presumption that may hinder the bailing of a Person otherwiseailable. *V. Stat.*

*Westm. 1. c. 12.* But in Appeals of Death the St. PC. 18.

Court in discretion admit not the Defendant to bail but upon weighty cause.

If the party be acquitted within the year upon Indictment, he is not to be discharged, but remanded or bailed at discretion, that an Appeal may be prosecuted against him, 3 *H. 7. c. 1.*

3. *Who may take bail, or bail Offenders?*

Bail was taken either *virtute brevis*, or *ex officio*.

1. Bail taken *virtute brevis*, that was either General or Special.

The general Writs.

*Homine replegiando.*

*Habeas Corpus* in the King's Bench.

*Writ of Mainprise*; this was directed to the Sheriff, commanding him to deliver by the Mainprise of

H 4

twelve

twelve the party indicted before him.

But now by *Stat. 28 E. 3. c. 9.*  
*St. PC. 77.* these Inquests before Sheriff are taken away, and consequently the Writ of Mainprise.

Special Writ, as where a party is convict of Manslaughter *se defendendo*; a Special Writ to certifie the—

2. Bail *ex officio*.

1. The *King's Bench*, who have a higher Power than any other Power.

1. They may either in case of an Original Suit, by Indictment or Appeal before them; or upon an Indictment or Commitment returned to them, by *Habeas Corpus* or *Certiorari*, bail where another Court cannot:

In case of Murther. *B. Mainprise*, 60, 63, &c.

In the cases prohibited by *Stat. Westm. 1. c. 15. V. Cook ibid. verb. Viscounts, & autres verb. ne soient replevisable.*

2. *Justices of Gaol Delivery*, who may bail in cases where Justices of Peace

Peace cannot, if it be of a thing within their cognizance :

§. As a person convict of Manslaughter *se defendendo* ;

§. Or a person convict of Manslaughter that hath a Pardon to plead.

3. Justices of Peace.

§. 1. They cannot bail in any case, but where they have cognizance of the cause ; therefore if taken upon Proceſs of Rebellion out of *Chancery* they cannot bail.

2. The *Statutes* that give power to Justices of Peace to bail in case of Felony, are 3 *H. 7. c. 3. 1 & 2 Pb. & Ma. c. 13.* upon which two kinds of bailments.

1. Upon the first Accuſation, and before Examination, and that doubtless must be done.

1. By two Justices, whereof one of *Quorum*.

2. After Examination taken *Cr. 156.* concerning the Offence.

2. After Commitment : And though some Opinion be that he may be bailed by one Justice, yet it seems

seems otherwise; for the *Stat. of 1 R. 3.* that gave power to one, stands repealed by *3 H. 7.*

3. After Indictment and Process thereupon issued in case of Trespass or Misdemeanour, or Penal Statute, not prohibiting bail, he may be bailed by two Justices, whereof one of the *Quorum*; and by some by one Justice, and thereupon may grant a *Superfed.* to the *Exigent.* But it seems this holds not upon a Process upon Indictment of Felony. *Quere.*

4. The Sheriff, Bailly, or Officers which was of Indictment before them: But these are removed from that power, as it seems by the *Stat. 28 E. 3. c. 9.*

*1 E. 3. 4. c. 3.* whereby they are not to make Process, but to remove them to the Sessions of the Peace.

Rumper



## Rumper Prison.

**N**O W having considered the persons that may arrest and bail, it makes way to consider the Offence against such Arrest or Imprisonment, by breaking such Prison, &c. And herein ensues the second Consideration.

2. What a Prison within this Statute?

1. The Stocks.
2. The Prison of a Lord of a Franchise.
3. The Custody of any that Lawfully arrests, or the house of the Constable, or other person where detained.
4. The Church, where a person abjuring is.
5. The Prison of the Ordinary, which is now ousted, Stat. 23 H. 8. c. 11.

3. What

3. What a *breaking*?

If the Prison be fired without the privity of the Prisoner, he may lawfully break it to save himself.

2. If a Gaoler do voluntarily permit him to escape, Felony in the Gaoler, not in the Prisoner; but if negligent, Felony in the Prisoner, and Misdemeanour in the Gaoler.

3. If Prisoner under Custody be rescued, or Prison broke by strangers without his procurement, no Felony in the Prisoner.

4. Going out the doors open, no Felony; for the *Statute* requires an actual breaking.

4. *Nisi causa; tale iudicium, &c.*

1. If *A.* mortally wound *B.* and is committed, and he break Prison, and *B.* then die, no Felony.

2. If a Felony made by a subsequent *Statute*, and an Offender committed therefore, break Prison, Felony.

3. Com-

3. Committed for suspicion of Felony, yet if a Felony done, breaking Prison Felony.

4. If the Offence for which the party was committed appear not by matter of Record, necessary a Felony be done, else breach of Prison no Felony.

But if it appear by matter of Record, and the party taken by *Capias*, if he break Prison, Felony, though no Felony done.

5. If Felony was done, yet breach of Prison no Felony, unless a lawfull *Mittimus, de quo supra*.

6. The Indictment for the breach must be Special, that it may appear he was committed for Felony.

## 5. *Tale Judicium requirit.*

1. Breach of Prison turns into Felony onely, though the party were committed for Treason.

But if a Prisoner break a Prison wherein Traitors are, to let out the Traitors, this is Treason.

2. A man imprisoned for Petit  
Larceny, or *Se defendendo*, breaks  
Prison, no Felony.

3. If a Prisoner break Prison he  
may be Arraigned of that before he  
be convict of the first Felony.

But a Gaoler permitting a volun-  
tary Escape shall not be Arraigned  
till the Prisoner be first attainted: for

v. Dal. 331. if the Prisoner be acquit, the Escape  
disputable.

no Felony done.

4. If Felony was done, yet breach  
of Prison no Felony, unless a breach

of Prison, he was taken.

5. The Indictment for the breach

must be special, that it may appear

he was committed for Felony.

6. The Indictment returns.

7. Breach of Prison turns into

Felony, and, though the party

were committed for Felony.

8. A Prisoner breaks a Prison

if he escapes, to let out the

Prison, this is Felony.

**Escape**

## Escape in the party.

**N**Ota, if a person escapes before arrest, not punishable in him as Felony, but for the Flight he forfeits Goods when presented.

In case a man slain in the day, if the Offender Escape, Township amerced. *Vide supra* to what

*Assint si soit dangerousment wound,*  
*3 H. 7. c. 1. Et si soit vill inamure*  
*ser. amerce, soit ceo in jour ou nuit.*

*3 E. 3. Coron. 299. Stat. Winton,*  
*cap. 4.*

And the same law seems to be  
 for an Escape by a stranger that  
 hath a Prisoner in his Custody, as  
 for an Officer in case of Escape vo-  
 luntarily or negligently.

## Escape.

*Escape in the Officer, or him  
that makes Arrest.*

**T**HIS is either in case of Arrest,  
1. By a Stranger.

2. By an Officer.

If a *stranger* arrest a man for Felony, or suspicion thereof, and deliver him over to four others, and they receive him and let him go at large, this an Escape in both; for the first man should have delivered him to the Constable; and the latter should not have let him go at large.

And the same Law seems to be for an Escape by a stranger that hath a Prisoner in his Custody, as for an Officer in case of Escape voluntary or negligent.

*Escape*

## *Escape by an Officer.*

**E**scape of an Officer.

*1. Negligent.*

1. Bailing a person not bailable, through ignorance, by one that hath power to bail, a negligent Escape.

But it seems if done by a Gaoler a voluntary Escape; because he hath no such power.

2. The ordinary punishment of a negligent Escape.

1. Of a party attaint  
100 *l.*

2. Of a party indicted  
5 *l.*

3. Of a party not indicted  
at discretion.

3. For insufficiency of the Gaoler, the Sheriff must answer for negligent Escapes.

1

4. A

## Escape.

4. A Gaoler *de facto*, though not *de jure*, must answer for Escapes.

5. If after a negligent Escape the Gaoler retake him upon fresh Suit before he be punished, it excuseth.

If the Constable bring a person to Gaol, the Gaoler refuseth him, the Vill shall be charged, and Gaoler fined.

## 2. Voluntary Escape.

St. 14 E. 3.  
c. 10.

1. Hath the same Crime that the person permitted to Escape stood committed for, *viz.* Treason or Felony.

2. But this is in the immediate person that permits it; and therefore though civilly the Sheriff must answer for offences of Gaoler, yet not criminally.

3. There must be a Felony really done, and a Commitment by a lawfull Warrant.

4. If within the year the Prisoner be acquitted upon Indictment, yet a voluntary Escape is punishable as  
Felo-



Felony, because wife intituled to her Appeal.

5. The Escape if voluntary punishable *ut supra*, though the Prisoner were not indicted.

Dal. fol. 336.  
Dy. 99.

## I 2 Rescne

## Rescue.

1. **A** Hindrance of a person to be arrested that has committed Felony is a Misdemeanor, but no Felony.

2. But if the party be arrested, and then rescued, if the arrest was for Felony, the Rescuer is a Felon; if for Treason, a Traitor; because they are all Principals.

But he shall not be arraigned till the Principal attainted; and if the Principal die before attainder, the Rescuer shall be fined and imprisoned.

3. There must be a Felony really done, and a lawfull Commitment.

*N. Rescue hors de custody de Constable, &c. est Felony, licet ne fuit amefne al Gaol.*

*Felonies*

# *Felonies by the Statute.* C. PL. C. 4.

3. **H** *En. 7. cap. 14.*  
Imagining and conspiring  
to kill the King, or any of his  
Council.

§. Clergy not taken away.

I *Jac. c. 12.*

§. *Witchcraft, de quo supra.*

§. 25 *H. 8. c. 6.* revived by

5 *El. c. 17.*

*Buggery with man or Beast.*

§. Without benefit of Clergy.

*Debet esse Penetratio as well as  
Emissio.*

In this and Rape *carnaliter cognovit.*

13 *E. 1. c. 34.*

*Rape*: This was Felony at Com-  
mon Law; then by *Stat. Westm. 1.*  
*c. 13.* made but a Misdemeanour;  
then by this *Statute* restored to Fe-  
lony again.

And hence it is that it is not in-  
quirable in a Leet, because though  
no Felony, yet it lost its nature by  
*W. 1. c. 13.* C. *sur cet*  
Stat.

I 3

Nul

## Felonies by the Stat.

*Nul Appeal done al party*  
18 E. 3. Coron. 169.

If the woman be under ten years, then though she consent, yet by Stat. 18 El. c. 6. it is a Rape; if above ten years, if she consent not, a Rape, though she consent after.

But in such case of a subsequent consent, the Stat. 6 R. 2. c. 6. gives the Appeal to the Husband, if none to the Father, &c.

Clergy taken away by Stat. 18 El. c. 7. upon Conviction by verdict, or Confession, or utlawed.

*Cestuy que aid in Rape est Ravissor.*  
11 H. 4. 13.

3 H. 7. c. 2.

Taking a Woman against her will and marrying her, Felony.

1. Such Maid, Widow, or Wife must have Lands, Tenements, or Goods, or be Heir Apparent.

2. She must be taken against her will.

2. She must be married or defiled.

4. Extends not to taking a Ward or Bondwoman.

*Nota,*

*Nota*, The taking away in one County, and marrying in another, indicted where married; and they may enquire of the forcible taking.

2. Privy to the marriage, but not to the force, not Guilty. 3. Marriage with consent not excusing so long as she is under the force, 13 *Car. Fulwood's Case*.

All Accessories before or after made Principals by this Act.

Clergy taken away by *Stat. 39 El.*

c. 2.

5 *H. 4. c. 5.*

Malitious cutting out Tongue or putting out Eyes, Felony.

Clergy not taken away.

Extends not to cutting off Ears.

8 *H. 6. c. 12.*

Stealing, carrying away or avoiding Records, Felony. And

The Judges of either Bench enabled to hear and determine the same.

Accessories before made Principals.

§. Clergy allowable.

5 *H. 4. c. 4.*

I 4

Multi-

**Multiplication of Gold or Silver,  
Felony.**

1 *H. 7. c. 1.*

Hunting unlawfully in Forests,  
Chases, or Warrens with painted  
faces by night, and rescuers, viz.  
other than the party arrested, Fe-  
lony.

31 *El. c. 4.*

Imbezelling the King's Armour,  
&c. Felony.

**Qualifications.**

1. Ought to be impeached with-  
in a year.

2. Offender loseth Lands but du-  
ring life.

3. No Corruption of blood.

4. Wife loseth not Dower.

5. Defendant admitted to proof.

3 *Jac. c. 4.*

Subjects passing Sea to serve fo-  
reign Prince, not having taken Oath  
of Obedience:

No Corruption of blood:

Offender may have Clergy.

*Articuli.*

*Articuli super Chartas c. 2.*

Purveyors Felons in certain cases;

§. They may have Clergy.

39 *El. c. 17.*

Wandering Souldiers Felons in certain cases.

§. Excluded of Clergy.

18 *H. 6. c. 19.*

Souldiers retained, as is prescribed in the Act, departing from their Captains without licence.

§. 2 *E. 6. c. 2. ad idem.*

§. Clergy excluded.

1 *Jac. 12.*

Marrying a second Husband or Wife, the former living, Felony: except cases following:

1. The Man under fourteen, or the Wife under twelve at time of first marriage, and not agreeing after first Espousals, may marry a second husband or wife.

2. A Man or Wife absent above seven years, second marriage no Felony: If beyond Sea, though notice  
of

1 Jac. 11.

of life; If in *England*, then without notice.

3. After a Divorce, though *mensa & thoro* only.

4. After a nullity declared of the former marriage by Ecclesiastical Court,

Offenders have Clergy.

1 Jac. c. 31.

5. For going with a Plague sore, but this discontinued.

14 El. 2.

6. Gaoler compelling Prisoner, by Duress to become Appellor, Felony, whether the Appellees be acquitted or not.

3 H. 5. c. 1.

7. Coining, or bringing in Gally halfpence, Goskins, or Dodkins.

8. And 2 H. 6. c. 9. payment of blanks.

Offender hath Clergy.

17 Ed. 3. c. 15.

9. Transportation of Silver, or Importation of false money made Felony.

Offender hath Clergy.

18 H. 6. t. 15.

Expor-



## Felonies by the Stat. 123

Exportation of Wool or Wooll,  
ells, other than to the Staple of  
*Calais*.

37 E. 3. 19.

Stealing Falcons, &c. or con-  
cealing the same after Proclamation,  
Felony.

Offender hath Clergy.

3 H. 6. c. 1.

Congregation of Masons to pre-  
vent *Statutes* of Labourers;

§. But this Obsolete by the *Sta-  
tute 5 El.* the Acts to which it re-  
lates are repealed.

27 El. c. 2.

Receiving, retaining, or main-  
taining a Jesuit or Popish Priest  
knowingly,

Clergy excluded.

35 El. c. 1.

Felony refusing to make Abjura-  
tion, or after Abjuration not to de-  
part, in some case.

Clergy excluded.

1 & 2 Ph. & M. c. 4.

*Egyptians* above fourteen years  
remaining here a month.

§. And 5 El. c. 20. takes away  
Clergy. 39 El.

39 *El. c. 4.* 1 *Jac. c. 7. 25.*

Dangerous Rogue adjudged to the Gallies; and returning without licence, Felony:

§. But Offender hath Clergy.

§. But branded Rogue Felon, and no Clergy.

5 *El. c. 14.*

Forging a Deed after a former Conviction.

*C. PC. l. 172.* If a man be convict or condemned of publishing a forged Deed, and after he forge a Deed, this is Felony.

If the offence were after a former, but before conviction thereof, no Felony,

Clergy ousted.

8 *El. c. 3.*

Sending sheep beyond Sea after a former conviction.

Clergy allowed

33 *H. 6. c. 1.*

Servants after decease of their Master, riotously spoiling Goods, &c.

Offenders shall have Clergy.

21 *H.*

21 *H. 8. 7.*

Servants imbezelling Goods of their Masters delivered to them, Felony;

But the *Statute* of 27 *H. 8. c. 17.* that took away Clergy being Repealed by 1 *E. 6. c. 12.* they may now have Clergy.

22 *H. 8. c. 11. 2 & 3 Ph. & Ma. c. 19.*

Cutting Powdike, Felony,  
Offender hath Clergy.

43 *El. c. 13.*

Detaining persons in *Cumberland*, &c. against their will, and giving or receiving blackmail, &c. Felony,  
Without Clergy.

*Mispri-*

## Misprisions.

**N**OW we come to Offences Criminal, but *not Capital*; and those of two kinds:

1. Offences by Common Law:
2. Offences against special *Statutes*.

Offences by *Common Law* not *Capital*, are either greater Offences or lesser:

Greater; and those come under name of *Misprisions*, which again are of two sorts:

Negative, in not doing that they ought, or of Omission.

Positive, in doing some great *Misdemeanour* they ought not.

*Misprision.*

# Misprison of Treason.

## The Negative Misprisions.

### 1. Misprison of Treason.

All Treason includes Mis- 2 R. 3. 9.  
prison: The Concealing of any C. P. C. c. 3.  
Treason, is declared Misprison one-  
ly by the Statute of 1, 2 Mar. c. 10.  
*que induc auxi misprison.*

But this in case of bare know-  
ledge; for if knowledge and Assent  
it is Treason: and though the Trea-  
son be by Statute, yet the concealing  
thereof is Misprison of Treason.

Every man therefore that know-  
eth a Treason, must with all speed  
reveal it to the King, his Privy  
Council, or other Magistrate.

He that receives and comforts a  
Traytor knowingly, be it a counter-  
feiter of Coin or other, is a Principi- C. P. C. c. 64.  
pal Traytor, and not onely guilty of  
Misprison. *Abingdon's Case* against  
the Opinion in *Dyer* 296. *Conier's*  
*Case.*

The

**Misprision of Treason.**

The Judgment in case of Misprision of Treason is Imprisonment during life, forfeiture of Goods forfeiture of profits of Land during life.

*Nota si un conuict un que ad counterfeit Coigne, & ne lui discover, est Misprision de Treason. Mes si un solment utter counterfeit coigne sciant ceo estre counterfeit nest Misprision de Treason, mes serra Fine & Imprison. Issint resolve a Newgate.*  
1661:

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*Misprision*

## Misprision of Felony.

1. **M**isprision of Felony is either by Common Law; or by Statute.

By the Common Law a concealment of a Felony, or procuring of the concealing thereof.

### The Punishment.

1. If a common Person, Fine and Imprisonment.

2. If an Officer, as Sheriff, Coroner, Imprisonment for a year, and Ransome at the King's pleasure by Stat. W. 1. c. 9.

By the Stat. 3 H. 7. c. 1. 33 H. 8. c. 6. one knowing of an unlawfull Assembly, and not discovering it within 24 hours.

Concealment of Jurors, v. Stat.

K

Theft.

## *Hestibote.*

3. **T***Hestibote*, which is more than a bare Misprision of Felony, and is where the Owner doth not know the Felony, but takes his Goods again, or other Amendments, not to Prosecute.

But taking the Goods again barely no offence, unless he favour the Thief.

The punishment hereof is Ransome and Imprisonment.

*Misprisions*



## Misprisions Positive, or of Commission.

1. **D**iscovery by one of the C. PC. c. 44.  
grand Inquest of the per-  
sons Indicted, or Evidence against  
them, Misprision, punishable by Fine  
and Imprisonment, but no Felony,  
nor Treason.

2. A person dissuading Witnesses C. PC. c. 64i  
from bringing in Evidence against a  
Felon is no Accessory, but a great  
Misprision, punishable by Fine and  
Imprisonment.

3. Reproaching a Judge, assault-  
ing an Attorney against him, or abu-  
sing a Juror that gave verdict against  
him; a great Misprision, punishable  
by Fine and Imprisonment.

4. Rescuing a Prisoner from the  
Bar of the Courts of *B. R. Canc.*  
*B. C.* or *Exchequer*, a Misprision for  
which the party shall lose his Hand,  
Goods, Profits of Lands, during Life,  
and perpetual Imprisonment.

5. If a man strike sitting the four  
Courts at *Westminster*, in the pre-  
sence

## Misprisions Positive.

sence of the Court, the like Judgment.

6. If in presence of those Courts, or before Justices of Assize or Oyer & Terminer, a person draw his Sword upon any Judge or Justice, though he strikes not, or strike another, like Judgment.

7. By *Stat. 33 H. 8. c. 12.* striking in the King's presence, drawing blood; loss of hand and perpetual Imprisonment, Fine and Ransom.

8. By *Stat. 14 El. c. 3.* forging of Money not current Misprision of Treason.

9. Stranger uttering false Money made within this Realm, knowing it Counterfeit, 3 *H. 7. 10.*

10. A Lord of Parliament departing from Parliament, 3 *E. 3.*

*Maiben*

*Maibem.*

And hither we may refer *Mai-*  
*-bem*, which though it be a  
 particular Crime, for which Appeal  
 lieth, yet it is not Felony of death.

Cutting off the hand, or striking C. CP. c. 40.  
 out a tooth, Maihem, but not cut-  
 ting off the ear.

The Judgment is onely Fine and  
 Damages; and therefore if recovery  
 in Trespass, it is a good barr in Ap-  
 peal of Maihem.

## *Offences not Capital.*

**O**ffences of an Inferiour nature: they are either such as are committed by an Officer.

Neglect of Duty,  
Bribery,  
Extortion.

Or such as refer to a common person, without relation to Office, and those reducible to three kinds:

1. Breaches of publick Peace, and therein

1. Of Affrays.
2. Of Riots.
3. Of Forcible Entries.
4. Barretries.
5. Riding armed.
2. Deceits and Cozenage,
3. Nufances.

Decay of Bridges.  
Decay of High-ways.  
Inns and Alehouses.

*Breach*

## Breach of the Peace.

### A F F R A Y,

If Weapons drawn, or stroke given or offered; but words no Affray: menace to kill or beat, no Affray; but yet for safeguard of Peace, Constable may bring them before Justice.

In Affrays considerable,

1. What a *private man* may doe?

Private persons may stay Affrayers till heat over, and deliver them to Constable.

If person hurt another dangerously, private person may arrest the Offender, and bring him to Gaol or next Justice. Dal. c. 8.

2. What by a *Constable*.

1. Affray in presence of a Constable, he ought to doe his endeavour to suppress it, otherwise finable.

2. If an Affrayer fly to a house, or if made in a house, Con-

K 4                      stable

## Breach of the Peace.

stable may break open house to preserve Peace, or take the Offender.

3. If in Affray assault be made upon the Constable, he may strike again, or imprison Offender.

4. Constable may in such case imprison till he find surety of Peace.

5. But it seems if Affray past, and not in view of Constable, he cannot imprison without Warrant of the Justice unless Felony done, or like to be done,

3. What by a *Justice*?

1. In his presence, the same power that a private person or Constable, and may imprison till surety of Peace found; the like upon Complaint.

2. If dangerous hurt, Justice may imprison till appear whether the party die or live, or bail the party.

The former better discretion.

*Riot.*

*Riot.*

When above the number of two meet to doe some unlawfull act, and do act it; but if they meet and act it not, an unlawfull Assembly, in power of Justices to suppress them, 13 *H. 4. c. 7.*

A man for safeguard of his house against Malefactors or Trespassers, may assemble his Friends for his Defence.

But he cannot assemble to prevent a beating threatned in his presence.

Riot recorded by one Justice upon view traversable; by two not, because pursuant to the *Statute.*

*Forcible*

*Forcible Entry,*

Forcible Entry must be either

*Manu forti,*

Furnished with unusual weapons,  
Menace of life or limb.

Breaking open door :

*Contra* it seems if door onely  
latched,

Ejecting forcibly the possessors.

*Cum multitudine gentium*, one may  
commit a Force, three at least a Riot.

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*Forcible*



*Forcible Detainer.*

Menacing the Possessor to go out upon pain of loss of life or limb.

Unusual Weapons or Company.

§. Refusing to admit the Justice to come in to view the Force.

Detainer with Force justifiable where party in possession three years;

§. But though his Possession lawfull, yet if within the three years actually removed, though restored by the Justices, enables not a Detainer with Force.

But if the three years Possession hath been by Force, then the last forcible Detainer punishable, and hinders not Restitution.

If a Disseisee within the three years make lawfull Claim, this an Interruption of his Possession.

*Restitution.*

*Restitution.*1. *By whom?*

1. Justices *B. R.* may restore upon Indictment removed before them.

2. One Justice of Peace cannot restore upon an Indictment before them; nor Sessions of Peace, unless upon Indictment found at Sessions.

3. It seems Justice of Gaol Delivery or *Oyer and Terminer*, cannot Restore.

2. *How?*

Upon view.

Upon Indictment?

Must be sufficient,

*Adhuc extra tenet.*

If Erroneous, may be superseded by the same Justice before Executed: After it is Executed then Rerestitution in *B. R.* upon Indictment quashed.

Resti-

Restitution *stayed*.

By *Certiorari*.

By quashing Indictment.

By pleading thereunto, which  
is nevertheless in discretion.

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*Barretry.*

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*Barretry.*

*Riding Armed.*

*Going Armed.*

V. Stat. 20 R. 2. c. 1. 7 R. 2. c. 13.  
2 E. 2. c. 3. Stat. Northampton.

*Nusances.*

## Nuisances.

**B** *Ridges Publick.*

Are not chargeable upon a particular person, but *ratione tenuræ*.

But of Common Right repairable by the whole County.

The manner of Repairing directed by *Stat. 22 H. 8. c. 5.*

*Highb-*

## High-ways.

**H**igh-ways: Provisions;

1. For their *Enlarging* and removing Trees within 200 foot of either side.

13 *E. 1. c. 5.*

5 *El. c. 15.*

2. For their Amending *vide* the *Stat.*

5 *El. c. 13.*

29 *El. c. 5.*

2 & 3 *P. M. c. 8.*

The *Charge* of repair of High-ways lies of common right upon that Parish wherein they are, unless,

1. A Special Prescription cast it upon another.

2. Unless the Owner of the Land, in which they are, inclose it, then it must be cast upon the Owner.

But they that have Ditches on either side ought to scour them, 8 *H.* 7. 5.

Inns,

Inns.

Ale-houses.

Bawdy-houses.

Gaming-houses.

---

L      *Common*

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## Common Inns.

1. **A**N Y person may erect a Common Inn, so it be not *ad nocumentum*.

1. In respect of their multitude, when there are enough ancient Inns before.
2. In respect of the inconvenience of the place or situation.
3. In respect of Disorders there permitted.

All which are common Nuisances, and may be presented and fined.

2. He that erects a Common Inn and *refuses to entertain* Guests, may be indicted and fined for the same.

3. If a Common Inn, contrary to *Statute*, suffer persons to tipple there as Ale-houses, he may be compelled to be bound; or may be suppressed as Ale-houses; or may be indicted at Sessions.

*Ale.*



*Ale-houses.*

SEE for *Ale-houses*, the suppressing of them, and the punishing of tippling in them, 5 *E. 6. c. 25.*  
 1 *Jac. c. 9.* 4 *Jac. c. 5.* 7 *Jac. c. 10.*  
 21 *Jac. c. 7.* 1 *Car. c. 4.* 3 *Car. c. 3.*

An Ale-house-keeper suppressed according to the *Stat. of 5 El. 6. c. 25.* by two Justices, whereof one of the *Quorum*, cannot be allowed but in open Sessions.

An Ale-house-keeper suppressed for the Offences 7 *Jac. c. 18.* 21 *Jac. c. 7.* for suffering tippling, or 7. *Jac. c. 10.* for selling less than is there directed, or 21 *Jac. c. 7.* for continuing drinking in another Ale-house, or 21 *Jac.* for being drunk, cannot be licensed in three years, and if he be, such License void.

5 & 6 *E. 6. c. 25.*

None to sell Ale, &c. unless licensed in open Sessions, or by two Justices, one of the *Quorum*.

L 2

Persons

## Ale-houses.

Persons lincensed to be bound by  
 Recog. not to keep unlawfull Games,  
 and for using good Order.

Recog. return next Quar. Sessi-  
 ons.

Process upon Recog. at Sessi-  
 ons.

Persons unlicensed keeping Ale-  
 house imprisoned by two Justices,  
 one of the *Quorum*, for three days,  
 and till Recogn. given not to sell  
 Ale.

Certificate of such Recogn. Con-  
 viction, and Fine 20 s.

1 *Jac. c. 9.*

Ale-men, Inn-keeper or Victualer  
*suffering* Inhabitant to sit *tippling*,  
 forfeit 10 s. to the Poor.

Conviction before one Justice, &c.  
 by two Witnesses.

Penalties levied by Constables,  
 and Churchwardens by distress and  
 Sale within six days.

In default of distress Offender  
 committed till payment *per* Justice.

Constable, &c. neglecting to le-  
 vy or certifie default of distress, for-  
 feits 40 s.

4 *Jac.*

## Ale-houses.

149

4 *Jac. c. 5.*

*Person drunk* forfeits 5 s. to be paid, within a week after Conviction, to the poor: If neglect, levy by distress, by Warrant from Justice; If not able to pay commit to stocks for six hours.

Constable neglecting duty forf. 10 s. to the use of the Poor.

Any person *sitting tippling* dwelling in the same Parish, forf. 3. s. 4 d. to poor, proved before Justice, levy *per* distress, and for want of distress commit *per* Justice to House of Correction.

Second offence bound to good Behaviour.

Constables, &c. bound by Oaths to present Offences.

Punishment within six months.

21 *Jac. c. 7.*

Former act extend to Foreigners, as well as Inhabitants.

One witness suffice to convict, or view of Justice.

Ale-house suppress not licensed for three years *per Stat. 7 Jac. c. 10.*

• 1 *Car. cap. 4* Former *Stat.*  
extend to Inn-keepers and Ta-  
verns.

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*Offences.*

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*Offences not Capital by  
Statute.*

**O**ffences not Capital more particularly *by Statute.*  
*Forgery by Stat. 5 El. c. 14.*

*Perjury, and Subornation thereof*  
*5 El. c. 9.*

*Champerty, Embracery and Main-  
tainance, 32 H. 8. c. 9.*

L 4

In-

*Ingrossing, Forestalling, and Regrating, 5 E. 6. c. 14.*

Salt Victual within *Statute*.

Apples and Cherries, &c. no Victual.

Mault seems not, but Corn and Grain expressly Victual by 5 *Ed. 6.*

A Stranger, or Subject, bringing Victual into the Realm, may sell them in gross, but the Vendee cannot; neither may any Merchant buy within the Realm, and sell in gross.

Attempting to enhance the price of Merchandize a kind of forestalling.

Selling Corn in the Sheaf unlawful.

*Matters*

## Matters of Religion.

1. **R**eviling the Sacraments, Imprisonment, Fine, and Ransom, 1 *E. 6. c. 1. Repealed*, 1 *Ma. c. 2. revived* 1 *El. c. 7.*

2. Not coming to Church to hear Common Prayer, by 5 *E. 6. c. 1.* subject to Church Censures.

*Nota*, 3 *E. 6. c. 1.* settled a Book of *Common Prayer*; Injoyned the use: Refusing to use it, using other, or depraving it, Imprisonment for six months for first offence, twelve months for second, during life for third.

5 *E. 6. c. 1.* Alters the Prayers, But applies the Penalty to the new Book.

*Nota*, *Repeal* 1 *Ma.* that *Repealed* 1 *Jac. c. 25.*

1 *El. c. 2.* Enacts the use of the Book of 5 *E. 6.* with some Alterations.

Any that,

1. Refuse to use it;

2. Use another form;

3 Deprave

3. Deprave it.

§. If Spiritual, six months Imprisonment first Offence; one years Imprisonment second Offence, Deprivation third Offence.

If Lay, first Offence 12. months Imprisonment, second Offence during life.

Depraving Book of Common Prayer, first offence 100 Marks; second offence 400 Marks; third offence forfeit Goods, and Imprisonment during life.

8 *El. c. 1.* touching Consecrating Bishops.

Concerning repair to Church.

1 *El. 2.* Every Sunday and Holiday *sub pœna 12 d. per diem.*

§. 23 *El. c. 1.* 20 *l. per mensem* for absenting; and if absent twelve months upon Certificate, bound to good behaviour.

29 *El. c. 2.* Conviction of Recusancy.

35 *El. c. 1.* Penalty of dissuading from Church; holding of Conventicles; commit to Prison without bail untill Conformity.

Non-



Nonconformity within three months after Conviction, shall abjure the Realm.

Not departing, or returning, Felony without benefit of Clergy.

Submitting discharged of the Penalty by this Act.

Relapsing looseth the benefit of the Submission.

Ten pounds *per mensem* for every person retaining or relieving Recusant after notice.

Cap. 2. Recusants not to remove five miles from dwelling.

1 Jac. c. 4. Conformable heir of a Recusant discharged: third part disch. of forfeiture.

Penalty of sending Children to Seminaries.

3 Jac. c. 4 & 5. Penalty for refusing Oath of Supremacy.

1 El. c. 1.

5 El. c. 1.

Of Obedience,

3 Jac. c. 4.

7 Jac. c. 6.

## *King's Bench*

**N**OW we come to consider of the *Proceeding* against a party for Felony, and therein,

1. Concerning the *Jurisdiction* or *Court* wherein Proceedings are to be had in Capital Causes; and those are principally

1. The King's Bench.
2. Justices of Gaol Delivery.
3. Justices of Oyer and Terminer and Assizes.
4. The Sheriff and Coroner.
5. The Lord Steward of the Household.

The *King's Bench* the Supreme Court of Criminal Jurisdiction. It is a Court of Oyer and Terminer, Gaol Delivery, and Eyre, in that County where it sits.

9 Rep. *Sancher's Case*.

By the coming of the King's Bench into any County, during the sitting thereof in that County, all power and proceedings of Commissioners of Oyer and Terminer is suspended.

But

But a Special Commission of Oyer and Terminer bearing *Teste* in the Term may be granted; and King's Bench may adjourn, and then they may sit.

Where the King's Bench proceeds upon an Offence committed in the same County, there need not fifteen days between the *Teste* and Return of the *Venire facias*; But if they proceed upon a Cause removed by *Certiorari*, they must have fifteen days.

9 Rep. San-  
char's Case.

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Gaol

## Gaol Delivery.

*C. Jur. Courts  
sub hoc titulo.*

1. **T**HE Justices of Peace ought to deliver the Indictments not determined unto those Judges, and they may Arraign any person in Prison upon them.

2. They may take Indictments against any person in Prison, and so may Justices of Oyer and Terminer, and herein they have a concurrent Jurisdiction.

3. They may take a Pannel returned by the Sheriff without a Precept.

4. They may deliver by Proclamation persons suspected, where there is no Evidence to indict them.

5. May award Execution of persons in Prison utlawed before Justices of Peace.

6. May assign Coroner to an Appeal, and make Process against the Appellee in a Foreign County.

7. May punish those that unduly bail Prisoners, *Stat. de Finibus*, 1 & 2 Ph. & Ma. c. 13.

8. May

8. May deliver the Gaol of persons committed for High Teason.

9. May Receive Appeals by Bill against persons in Prison.

10. By *Stat. 9. E. 3. 15.* must send their Records into the Treasury of the Exchequer at *Michaelmas.*

11. Others may be added to the former Commission by Commission of Association, or their power committed to fewer by *Si non Omnes.*

12. By *Stat. 2 & 3 Ph. & Ma. c. 18.* a General Commission of Gaol Delivery through the County determines not a Special Commission granted in a Corporation, &c. parcel thereof.

13. By *Stat. 1 E. 6. c. 7.* the subsequent Commissioners of Gaol Delivery, power to give Judgment upon such as were Reprieved before Judgment by former Commissioners and Procefs before any former Commissioners of Peace, Gaol Delivery, Oyer and Terminer, or others not discontinued by granting new Commissions.

If a Prisoner be bailed, he is yet  
in

in Prison to be Arraigned before these Justices, for he is a Prisoner: contrary in case of Mainprize, 21 H. 7. 33. 9 E. 4. 2. 39 H. 6. 27.

Cr. Jur. 226.

Although their Commission determine with their Session, after they are gone, they may command a Reprieve or Execution, Dyer 205.

*Licet soit ad Gaolam deliberandum hac vice uncore pnt' adjourner leur Commission, Cr. Jur. 226.*

*Commission d' Oyer & Terminer, & Gaol Delivery, pnt' Estoyer ensemble, Ibid. Bro. Commission 24.*

*Justices de Gaol Delivery & Oyer & Terminer, pnt' enquire per ambideux powers, and make up their Records accordingly, 9 H. 7. 9. Cr. Jur. 226.*

Oyer

## Dyer and Terminer.

1. **T**He Justices Authority must be by Commission, and not by Writ, otherwise their Proceedings void. 42. Aff. 12.

2. They cannot proceed but upon an Indictment taken before themselves.

3. By good Opinion they may proceed the same day or Session against a party Indicted before them. *Nota le contrar' ad estre adjudge.*

4. Where Offences are limited to be heard and determined in any Court of Record, generally it may be heard and determined by them. *Quere, for Gregory's Case contra. V. Dyer. 236.*

5. Others may be added, or their power contracted by Association, or *Si non omnes*, as before.

6. One sitting without Adjournment determines their Commission.

M

7. Justices

7. Justices of Oyer and Terminer, of of Peace, cannot assign a Coroner, as Justices of Gaol Delivery may.

8. By *Stat. 9 E. 3.* they are also to send their Records determined into the *Exchequer*.

V. 12 Aff. 21.

9. A *Superfedeas* suspends their power, and a *Procedendo* revives it; but a new Commission determines it; the like of Commission of *Nisi prius*, &c. but it determines not without notice.

1. By shewing the new Commission.

V. 2 & 3 P.  
& M. C. 10.

2. Or proclaiming it in the County.

3. Or Sessions held by new Commission.

10. An Award upon the Roll not sufficient to return a Jury, but a Precept under Seal of the Commissioners.

11. And *Nota*, That a Special Commission of Oyer and Terminer may be granted to sit in one County to hear and determine Treasons, &c. in another, but then the Indictment must



must be found in proper County,  
and the Trial by Jurors of proper  
County. *C. P. C. fo. 27.*

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**M 2** *Justices*

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## Justices of Assize.

**B**Y Stat. 27 E. 1. c. 3. *de finibus* Justices of Assize have power to deliver Gaols of Felons and Murderers.

And by some opinion they may doe it *virtute officii*, without any special Commission. S. PC. c. 5.

But in case of Counterfeiting Coin, &c. upon Stat. 3 H. 5. Stat. 2. c. 7. they must have a Special Commission.

*Justices*

## Justices of Peace.

**T**HE Stat. of 18 E. 3. c. 2. gives them power by Commission to hear and determine Felonies and Trespasses against the Peace.

But then there must be a special Clause in their Commission, *Necnon ad aud' & terminand' felonias, &c.* Otherwise they cannot doe it. S. P. C. L. 2.  
c. 5.

Yet that Clause doth not in propriety make the Justices of Peace Justices of Oyer and Terminer, because that it is a distinct Commission; and therefore a Statute, as that of 5 El. c. 14. limiting Forgery to be heard and determined before Justices of Oyer and Terminer, gives not the power therein to Justices of Peace; but the Justices of the King's Bench are Justices of Oyer and Terminer within this Statute. V. C. P. C.  
c. 14.  
Dal. c. 23.  
9 Rep. 118.

By force of the general words of their Commission they may enquire of Murther at their Sessions; for though by Stat. 6 E. 1. c. 9.

## Justices of Peace.

and 4 E. 3. Murthers and other Homicides must stay till Gaol Delivery; yet the *Stat.* of 18 E. 3. c. 2. 34 E. 3. c. 1. 17 R. 2. c. 10 hath enlarged their Commission and Power.

Yet in respect the *Stat.* 1 & 2 Ph. & Ma. c. 13. directs Justices of Peace to take Examinations in Cases of Homicide and other Felonies, and to certifie them to the Justices of Gaol Delivery: in point of Discretion they do forbear to proceed to determine great Felonies.

Dal. c. 20.

But for Petit Larceny, and other small Felonies, they use to bind over the Prosecutor to the Sessions.

By *Stat.* 4 E.  
3. c. 2.

The Justices of Peace may proceed upon Indictments taken before themselves, or former Justices of Peace: but cannot proceed upon Indictments before Coroner, or Oyer and Terminer; but Justices of Gaol Delivery may; and the Justices of Peace are to deliver the Indictments taken before them to the Justices of Gaol Delivery, by *Stat.* 4 E. 3. c. 2.

They

## Justices of Peace.

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They cannot deliver persons suspected by Proclamation, as Justices of Gaol Delivery may. Crom. fol. 9.

In Cases of Felonies by *Statute* limited to be heard before Justices of Peace, they may proceed at Sessions; and consequently may bind over Informers, and certifie Examinations at Sessions.

But such Felonies by *Statute* as are specially limited to Justices of Oyer and Terminer, or other Justices and not to them, the Justices of Peace cannot proceed to take Indictments, as upon *Stat. 3 H. 7. c. 18.* for contriving to destroy the King, &c. upon *Stat. 33 H. 8. c. 12.* Murderers in the King's Palace; upon *Stat. 8 H. 6. c. 12.* of razing or imbezelling Records; upon *Stat. 5 El. c.* of Forgery; upon *Stat. 13 H. 6. c. 1.* secret imbezelling goods, &c. upon *Stat. 2 & 3 Ed. 6. c. 24.* Striken in one City, and dies in another, or accessory in another County.

But in the former cases it seems *Dal. c. 20.* they may take the Examinations,

M 4

and .

## Justices of Peace.

and commit the Offenders, and bind over Prosecutors.

If any Indictment be taken before Justices of Oyer and Terminer, Gaol Delivery, or Coroner, they cannot proceed upon them; but upon Indictments taken before the Sheriff in his Turn, they may proceed by *Stat. 1 E. 4. c. 2.*

In cases of Treason, Misprision of Treason or Premunire, regularly Justices of Peace have no Jurisdiction; yet two things may be done;

*Dal. c. 90.*

1. In any case of Treason, because it is a breach of the Peace they may upon complaint imprison Offenders, take Examinations, bind Prosecutors over, and certify their proceedings into King's Bench or Gaol Delivery.

*Dal. c. 2.*

2. In some cases they are enabled to take Indictments, but not to hear and determine the same, but certify the same into the King's Bench upon *Stat. of 5 & 23 El.*

1. Maintainer of Authority of the See of *Rome.*

2. Obtaining Bulls, &c.

3. With-

## Justices of Peace.

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3. Withdrawing from Allegiance.

4. Bringing in *Agnus Dei*, &c.

A person bringing one before a Justice suspect of Felony, and refusing to be bound to prosecute, may be committed, if it appear he can testify materially.

They may Enquire of any Felony within the County, though within the Verge. 4 *R. Wigg's Case*.

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*Coroner.*

## Coroner.

**H**ATH power in three Cases:  
 1. To take Indictments of  
 Death; but this he can onely do  
*super visum corporis*, otherwise void.  
 Hence

- St. CP. fo. 51.*
1. If the Body be interred before he come, the Township amerced, and he must digg up the Body; so if the Township suffer the Body to lie long to Putrefaction without sending for the Coroner: The like of one dying in Prison.
  2. If the Coroner be remiss, and comes not being sent for, he shall be fined and imprisoned.
  3. He may enquire of flight, and such Presentment not Traversable.
  4. If the Body cannot be seen the Justices of the Peace may enquire thereof.

*Nota.*



*Nota*, The Record of the Coroner of great Authority; if he Record a Confession of a Felony by Approver, or a Confession of breach of Prison, or an Abjuration, it shall not be Traversed.

5. *Jury dnt' Coroner acquit person accuse dnt' enquire quis occidit.* 11 E. 4. 3. 14 H. 7. 2.

And it seems by some he hath power to enquire of Rape, Breach of Prison.

He hath Jurisdiction upon Arms of the Sea, where a man may see from side to side.

2. Concerning *Appeals*.

The Coroner, together with the Sheriff, hath power in the County Court to receive Appeals of Robbery and other Felonies: But then it must be of a Felony in the same County: Upon this Appeal they may grant Process till utlary; but it seems they cannot send an *Exigent*, because prohibited by *Stat. of Mag. Chart. c. 17.* St. PC. fo. 52.

Such Appeal may be by Bill; and it may be removed into King's Bench by *Certiorari*, but it must issue both St. PC. fo. 64.  
to

to Sheriff and Coroner, and not to Sheriff onely.

It appears by *Stat. 3 H. 7. c. 1.* That an Appeal of Murther by Bill lies before Sheriff and Coroner.

3. The Coroner alone may take the Appeal of any *Approver* of a Felony in any County.

*St. P. C. 53.* But then he cannot make Proceſs thereupon, but enter it in his Roll, and ſend it to the Juſtices of Gaol Delivery, who thereupon may iſſue their Proceſs to the Sheriff of the foreign County to take the Appellee.

4. To take the *Abjuration* of him that acknowledges a Felony done in the ſame County, or any other.

And note, That though more Coroners than one in any County, yet any one may exerciſe any of the powers before.

But the Preſentment of him that is firſt taken ſtands.

*Sheriff.*

Sheriff.

THE power of the Sheriff to take Indictments, was either *virtute Commissionis*, which is taken away by the Stat. 28 E. 3. c. 9.

*Officiū*; in his Turn: wherein

1. The Turns must be held *infra* *St. P.C. l. 24. mensem Paschæ & Michaelis*; otherwise the Indictments there are void *per Stat. 31 E. 3. c. 14.*

2. The Indictments must be under Seal of the Jury by *Stat. of West. 2. c. 13.* indented *per Stat. 1 E. 3. c. 17.* and the same for Lords of Franchises.

3. The Indictors must be of good name, having 20 s. Freehold, or 26 s. 8 d. Copyhold; otherwise Sheriff punishable by *Stat. 1 R. 3. c. 4.*

4. The Turn can take no Indictment but of that which is Felony by Common Law, or of such matters as are particularly by Act of Parliament limited to them, and therefore

fore an Indictment of Rape void there.

5. Upon any Indictment of Felony before the Sheriff in his Turn, they can make out no Process, but must send them to the Justices of Peace, who have power to proceed thereupon as if taken before themselves, by *Stat. 1 E. 4. c. 2.*

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**Court.**

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**Court-Leet.**

**T**HE Court-Leet hath in effect  
the same Jurisdiction with  
the Turn; but Presentments of Fe-  
lony before them are to be sent  
before Justices of Gaol Delivery.  
} H. 4. 18.

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**The**

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*The means of bringing Capital Offenders to Trial.*

**H**AVING considered the Courts of Justice, now we come to consider the means of bringing Capital Offenders to their Trial; and that is Regularly by one of these three ways;

Appeal.

Approver.

Indictment.

---

And herein some things are proper to each proceeding.

§. Some things are common to them all, which come to be considered after particulars, proper to either, dispatched, *viz.*

Process.

Arraignment; and therein of Principal and Accessory.

Demeanour of the Party Arraigned;

Standing

# Capital Offenders to trial. 177

Standing Mute.  
Confessing.  
Pleading and Pleas.

Declinatory,  
Sanctuary.  
Clergy.

In Barr,  
Pardon.  
*Auterfoits Acquit.*  
*Auterfoits Convict.*

To the Felony.  
Trial,  
By battel.  
By Jury, and therein  
Process against the  
Jury.  
Challenge.  
Evidence.  
Verdict.  
By Peers in case of  
Nobility.

N

Judg-

178 **Capital Offenders to trial.**

Judgment in the several Cases  
Capital.

Execution.  
Reprieve.  
Falsifier.  
By Errour.  
By Plea.

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*Appeal.*

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## Appeal.

**A**ppeals in respect of the manner of proceeding, are of two kinds;

1. By Writ.
2. By Bill.

Touching Appeals *by Bill*, they may be prosecuted.

1. In the King's Bench against any that is *in custodia Mariscalli*, or let to bail: they are the Sovereign Coroners.

2. In the Court before Commissioners of Gaol Delivery against a Prisoner, or one let to bail, but not of one let to Mainprize.

But if one of the Appellees absent, remove in *B. R.* by *Certiorari*.

3. By some before Justices of Peace, *quod Quære* 44 *E.* 3. *Coron.* 95.

4. Before Sheriff and Coroner, as before; and it may be removed by *Certiorari* in *B. R.* 3 *H.* 7. c. 1.

N 2

5. Be<sup>a</sup>

## Appeal.

5. Before the Constable and Marshall, of a Felony done out of the Realm, 1 H. 4. c. 14.

In relation to the *Matter*.

Appeals are in matter,

1. *Not Capital*, as an Appeal of Maihem, which may be commenced in King's Bench, Gaol Delivery, or before Coroner and Sheriff.

This, though it be *felonice*, yet is but a Trespass in its Nature and Judgment.

2. *Capital*; and that either

1. Of *Treason*; but this ousted by Stat. 1 H. 4. c. 14,

2. Of *Felony*; and these of three kinds.

1. Of Death.

2. Of Larceny.

3. Of Rape.

*Appeal.*

## Appeal of Death.

**A**N Appeal of Death is either by the Wife or Heir.

1. Appeal of Death *by the Wife*; and therein these *requisite*;

1. She ought to be a wife *de jure*, and not *de facto* onely; and therefore *ne unq; onc'* *accouple* a good Plea.

2. But she need not be dowable; for if she had Elop-  
ped, or the Husband been  
Attaint; yet she may have  
an Appeal of his death.

3. She ought to continue his  
Widow; for if she marry  
before, or pending the Ap-  
peal, the Appeal fails for  
ever; or if she marry after  
Judgment she cannot have  
Execution.

2. Appeal of Death *by the Heir*.

1. If the dead hath a wife, the  
heir shall not have Appeal  
though she die within the  
year: but if the Wife

N 3

kill

## Appeal.

kill the Husband, there the Heir shall have an Appeal.

2. He must be Heir by course of Common Law; this hath these Exceptions:
  1. Where Heir is disabled by Attainder.
  2. Where the Appeal is against the Heir; in these cases it goes to the next Heir, as if the other were dead without issue.
  3. It must be by Heir that was Heir at time of death of Ancestor; for if he die within the year before, or after Appeal commenced, it is lost.

But it seems if the Heir having Judgment die, his Heir may have Execution.

4. It must be an Heir and Male; *Nullus capiatur prop' Appellum femina alterius quam viri sui*: But if he be Heir, and Male, though he derive through Females,

Females, he may have an *C. Lit.*  
Appeal.

5. A man above Seventy, or an Infant, may have Appeal; but no Battel waged, and adjudged of late times the Paroll shall not Demurr.

*Sed Quare.*

But an Idiot, Monk, or Man mute, shall have no Appeal, neither of death, nor otherwise.

And Note, the Appeal of death *C. P. C.* 53. must be within year and day after death by *Stat.* 3 *E. 6. c. 24.* stricken in one County, and dies in another; or Accessory in one County, to death in another; Appeal brought where party died.

*Appeal of Robbery.*

Servant robbed, Master or Servant may have Appeal.

But Testator robbed, Executors shall not have Appeal.

Villain shall not have Appeal of Robbery against his Lord; *contra* of death.

Two joint Owners robbed, Survivor shall have Appeal.

A Woman or Infant shall have an Appeal of Robbery.

If a man be robbed at several times, he must put all into one Appeal.

What omitted is Confiscate.

The Appeal affirms the continuation of the property. Therefore if *A.* rob *B.* in the County of *S.* and go with the Goods into the County of *D.* an Appeal of Larceny lies in the County of *D.* but not of Robbery, for that is upon a taking from the person.

If *A.* be robbed by *B.* who is robbed by *C.* *A.* may have an Appeal of Larceny against *C.*

This

## Appeal.

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This Appeal may be prosecuted in a year, two, or three, if there was fresh suit; and the judging of fresh suit lies in the discretion of the Court.

And Note, This, or any other Appeal lies against an Infant, against a Monk, without naming his Sovereign, against a Feme covert without naming her Husband.

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*Appeal*

*Appeal of Rape.***Appeal of Rape.**

1. Lies for the party ravished.
2. But if she consented to the Rape afterwards, then by *Stat. 6 R. 2. c.* it is given to the Husband; if none, to the Father; if none, to the Heir, whether Male or Female.

If she be taken in one County, and ravished in another, the Appeal of Rape lies in that County where actually ravished.

Although by *Stat. W. 1. c. 13.* whereby Rape was turned into Trespass, forty days is limited for her Suit; yet it being again made Felony by *Stat. W. 2. c.* and no time limited for it, it may be brought in any reasonable time.

*Process*



## Process in Appeal.

Concerning Process in Appeals,  
*vi. infra* Process in general, because  
 many things therein common to  
 Appeals and Indictments.

### The Count in an Appeal.

1. The Plaintiff in his Appeal  
 must mention the place and day;  
 need not mention the hour; and  
 though day be mistaken, not mate-  
 rial upon Evidence.

2. It sufficeth for Plaintiff to  
 count against Defendant, according  
 to the construction that the Law  
 maketh upon the Fact.

If *A. B.* and *C.* present, and *B.*  
 onely strike the mortal stroke, he  
 may count against them all, that  
 they stroke: So in Rape.

3. An Appeal by Heir ought to  
 shew *Coment*.

4. In Appeal of Rape, *felonice*  
*rapuit* sufficient without saying *car-*  
*naliter cognovit*, *vid. 11 H. 4. 1.*

5. In

5. In Appeal against *A. B.* and *C. A.* onely appears, he must count against all by the better Opinion.

6. At this day but one Appeal against all Principals and Accessories, and if an Appeal be against *A.* and he is attaint or acquit, or Plaintiff non-suit, he cannot have another Appeal against *B.* But if Accessory in one County to Felony in another, there several Appeals against Principal and Accessories.

*Pleas*

## *Pleas to the Writ and in Bar.*

Writ of Appeal abate,

1. For insufficiency in the Writ, as wanting *rapuit*, false Latin, &c.

2. Multiplicity of Action; a second Writ of Appeal purchased, pending a former Writ abates; but if pending a former in the County abates not.

But if the first Appeal by Bill be removed into the Bench by *Certiorari*, and the Plaintiff had appeared thereupon, and counted, abates the second Writ.

*Nul tiel in rerum natura*, as one of the Defendants, abates *vers tous*, &c.

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*Pleas*

*Pleas in Barr.*

*Vid. infra in ceo general Title as to Autrefois Convict or Acquitt.*

C. PC. 98.

1. He may plead any thing whereby it appears the Plaintiff is not intituled to the Appeal *de quo v. supra.*

2. Nonsuit in a former Appeal after Declaration, so of a *Retraxit.*

3. The Plaintiff brought an Appeal of the same Felony against another, who was acquitt or attainat at his Suit.

4. Plaintiff hath released to Defendant; but if Appeal against Divorce, a Release or *Retraxit* as to one no barr for the other.

5. If Defendant plead in Barr, he may also plead over to the Felony, and it shall not be double.

1. But in case of a Release pleaded, he shall not plead over to the Felony, because repugnant.

2. In

## Appeal.

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2. In case of Villenage pleaded he shall not plead to the Felony, because Infranchisement; yet if that barr sound against him, he may plead not Guilty; and so in any other case where he pleads in barr without pleading over except Release.
- 

*Approver.*

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## Approver.

C. PG. c. 65. I. **W**HAT it is to be an Approver?

S. PG. f. 142.

A person indicted of Treason or Felony not disabled to accuse before competent Judges, confessing the Indictment, and sworn to reveal all Treasons and Felonies he knows, and then before a Coroner entering his Appeal against *participes Criminis* in the Indictment within the Realm.

2. Who may be an Approver, and who not?

1. A Peer of the Realm cannot be an Approver.

2. A person Attaint cannot be an Approver; nor a person out of Prison though indicted.

3. A Woman, Infant, Idiot, *Non compos*, Clerk, cannot be Approver.

4. But a man above seventy, or maimed may, but he shall not wage Battel.

5. Clerk

5. Clerk Convict may.

3. In what cases?

1. None can approve but an indicted; and therefore if onely in Prison upon suspicion, he may indeed confess the Felony, but such Confession amounteth not to an Attainder or Conviction, though it be an Evidence, and therefore cannot approve.

2. The Appellee in Appeal cannot be an Approver.

3. The Appellee of Approver cannot be Approver, for that would be infinite.

4. Though a person Indicted approve, yet if after an Appeal be against him, the Approvement ceaseth.

5. He that hath once pleaded to the Felony cannot be Approver, but shall be hanged, for he is found false.

4. Of what Offences?

## Approvers

It must be onely of the Offences contained in the Indictment, be it Felony or Treason, and therefore not of another Offence, nor of an Accessory before or after to the same Offence; yet his Oath general, therefore as to other Offences, it is but a Detection, not an Approvement.

5. Before whom?

Before such Judges onely as can assign a Coroner, as King's Bench, Gaol Delivery, Oyer and Terminer, High Steward; but not before Justices of Peace, Court Baron, or County Court.

But it is in the discretion of the Court either to suffer him to be Approver, or to respite Judgment and Execution, till he hath Convicted all his Partners.

6. How Demeaned after Appeal?

1. After Felony confessed upon the Arraignment, a Coroner assigned and sworn in Court to discover Offenders.

2. A



2. A day prefixt, within which he is to perfect his Appeal before the Coroner, and in every of those days he must Appeal; for if he fail in any, and the Coroner record it, he is to be hanged.

The time limited to perfect his Appeal by 5 E. 2. c. 34. is three days, but that Repealed 15 E. 2.

3. During the time limited for his Appeal, he shall be at large, and have 1 d. per diem till his Appeal finished.

4. If he Appeal persons beyond Sea, or such as are not in *rerum natura*, and that appear by Testimony of Country, or by Retorn of Sheriff *quod non fuit invent*; he shall be hanged.

5. After his Appeal formed before the Coroner, he must repeat it *verbatim* before the Court; and if he fail

## Approver.

thereof, and the Coroner Record it, he shall be hang-  
ed.

7. *Process in Appeal.*

1. In the same County the Coroner may award Process to the Sheriff till Exigent.
2. If Appellee be in a foreign County, then the Judges before whom the Appeal is, may grant Process, viz. *B. R.* or *Itinerant* by Common Law: and by *Stat. 28 E. 1. de Appellatis* the Justices of Gaol Delivery may send Process into a foreign County, as well to apprehend the Appellee, as a *Venire facias* to try the Issue.

S. PC. L. 146.

8. *Proceeding upon Trial.*

The Appellee may put himself upon the Country, or wage Battel.

If five Appellees, and they wage Battel, he must fight them all.

If two Approvers against one Appellee, if the Appellee vanquish the  
he is acquitted against the rest:  
though

though Appellor retract his Appeal, or be vanquished; yet if the Offence be within Clergy he shall have it; and so of the Appellee.

## 9. Proceeding after Trial.

If the Appellor convict the Appellee, either by Battel or Verdict, the King *ex merito justitiæ* is to pardon him; and from the time of his Appeal till his Pardon or Conviction, ought to have wages.

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O 3     *Indict-*

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## Indictments.

**T**H E S E things considerable :

1. Where an Indictment requisite in cases Capital, and where not.
2. What the quality of Indictors
3. Of what matters they may Enquire.
4. Before whom found.
5. What requisite in the manner of them.

1. Where an Indictment requisite for a party to be Arraigned at the King's Suit.

1. By the ancient Law, if a man was taken in Larceny with the manner, and that brought into Court with the Prisoner, the Prisoner should be Arraigned there-upon without any Indictment. *Stat. P. C. f. 148.*

And such was the use of those Manors that had Intangthes, *Ibid. f. 29. v. 1 E. 3. 17. 17 Aff. 49.* but this disused.

2. If

1. If Trespafs be brought *de mal-  
licie abducta cum bonis viri*, and the  
Defendant found Guilty: or if in  
Trespafs for Goods the Defendant  
be found that he stole them; this in  
the King's Bench equivalent to an  
Indictment, and the Defendant put  
to answer to the Felony.

3. In some Cases upon Appeals  
by Appellors or Approvers not pro-  
secuting, &c. the Defendant ar-  
raigned at the King's Suit; because  
it carries a presumption of truth; and  
therefore if the Defendant be both  
Appealed and Indicted upon a non-  
prosecution of the Appeal, the party  
shall be arraigned upon the Appeal,  
not the Indictment. 4 E. 4. 10.

Wherein,

1. If the Plaintiff in Appeal by S. PC. 143.  
Writ be Nonsuit before Declarati-  
on, he shall not be arraigned at the  
King's Suit. 1. Because no certaint-  
ry. 2. The Writ may be at ano-  
thers Suit, but if it be by Bill ei-  
ther by Appellor or Approver, it  
seems he shall, because the certainty  
appears; therefore in the former  
O 4 Case,

## Indictments.

Case, if there be no Indictment against him, he is dismissed.

2. If the Plaintiff release his Appeal after he hath commenced it, the party shall be arraigned at King's Suit: But if before it was commenced, then not; because it was never well commenced.

3. If the Plaintiff or Approver after Appeal commenced, confess it false, or take to his Clergy, or wave his Appeal, yet arraigned at the Suit of the King: But if the Approver after Battel joyned do in the field confess it false, the Appellor hang'd, and the Appellee discharged, because amounts to a vanquishment.

4. If the Appeal abate by Act of the Plaintiff, as taking Husband; or act in Law, as death; Appellee arraigned at the King's Suit: But if it abate by insufficiency in the Appeal, as by false Latin, Misnomer, or because Plaintiff disabled to commence Appeal, as Utlary of Felony, or Trespas; or the year and day past; or Plaintiff not Wife or Heir; Defendant, not arraigned upon Appeal, but may be Indicted.

5. If

5. If the King pardon after Bat-  
tel joyned in Appeal by Approver,  
no Arraignment at King's Suit, but  
Appellee discharged.

And Note, where the Prisoner S. P. C. 104  
arraigned upon the Appeal, a *Cesset*  
*Processus* entred upon the Indict-  
ment.

The return of the Sheriff of Re- S. PC.  
fue or Escape of a Felon, not suffi-  
cient to put the party to answer the  
Felony.

2. The second thing considerable  
is the quality of *the Indictor*.

Concerning Indictments in Leets  
and Turns, *v. ante* upon *Stat. W. 2.*

c. 13. 1 E. 3. c. 17. 1 R. 3. c. 4.  
1 E. 4. c. 3.

There is a general *Statute* that St. PC. l. 33.  
refers to all Indictors, as well in case  
of Felony as Treason, 11 H. 4. c. 9.  
which requires

1. Indictors not to be
  1. Persons fled to Sanctuary  
for Felony or Treason.
  2. Not outlawed.
  3. Not Indicted or Attainted.
  4. Not by Conspiracy.
2. That

## Indictments.

2. That the Indictors be the King's Liege people.

3. Returned by the Sheriff, or Bailiffs of Franchises.

4. Not at the nomination of any person.

And all Indictments taken contrary void.

Hence it follows.

1. That the Prisoner upon his Arraignment may plead this matter, or any point of the *Statute*, and may plead over to the Felony. *Vide Scarlet's Case.*

2. Though there be twenty of the grand Jury, yet if one was outlawed or taken at the nomination of another, it avoids the whole Indictment.

By *Stat. 3 H. 8. c. 12.* Justices of Gaol Delivery, or of Peace, whereof one of the *Quorum*, in open Sessions may reform the Pannel of the Grand Jury, by putting in and taking out Names, and the Sheriff is to return the Pannel so reformed.

But this takes not away the former *Statute* of 11 *H. 4.* nor alters it.

By



By Stat. 33 H. 6. c. 21.

Special provision is made for the quality of the Indictors in *Lancashire*.

3. Of which things they can Enquire.

Regularly they can Enquire of nothing but what ariseth within the Body of the County for which they are returned.

And therefore if an Indictment for scandalous words, or other matter transitory be found upon Not Guilty pleaded thereunto, if upon Evidence it appear to be spoken in another County, the Defendant is not guilty.

And therefore where Stroke was in one County, and death in another, he could not be Indicted where party died.

But for a Nuisance in one County to another, a Jury of the County where Nuisance is committed may Indict it.

But divers Statutes have Introduced an alteration of the Law in some Capital Cases, 28 H. 8. c. 15.

Trea-

# Indictments.

Treasons, Felonies, Robberies, Murthers, and Confederacies upon the Sea may be enquired, tried, heard, determined, and judged in such Shires and places as shall be limited by the King's Commission to be directed for the same.

A Treason done out of the Land, it hath been held that it may be enquired of and tried where the Offender had lands; but to avoid the Question by *Stat. 35 H. 8. c. 2.* all Treasons and Misprisions, or concealments of Treasons done out of *England*, may be enquired, heard, and determined by the Justices of the King's Bench, by persons of the County where the Bench sits, or before Commissioners, and in such Shires as shall be appointed by the King's Commission, by good men of the same Shire, as if the Treasons, &c. had been done in the same Shire where inquired.

Upon this *Statute*.

St. P. C. l. 71.

1. If the Bench remove after Indictment into another County, the Trial shall be by persons of the first County.

2. The

2. The King's writing his Name to the Commission, or putting his Signature to the Warrant, sufficient.

3. Ireland is out of the Realm to this purpose.

These Statutes stand unrepealed C. PC. l. 24. by Stat. of 1 Ma. c. but the Stat. of 32 H. 8. c. 4. for trial of Treason in Wales repealed by 1 Ma.

Again, by Stat. 2 & 3 Ed. c. 24. a man stricken in the County of D. dies in the County of S. or Accessory in one County to Felony in another County, may be indicted and tried in the County where the death was, or Felony committed by the Principal; but it must be laid according to truth. C. PC. 49.

4. If Inquest conceal any matter presentable before Justice of Peace, they may Impannel Inquest to enquire of such Concealments, and amerce the Concealers, by Stat. 3 H.

7. c. 1.

4. Before whom found.

Of this before.

5. The

## 5. The form of Indictments.

## 1. By Statutes:

St. PC.

4 H. 4. c. 2. *Insidiatores viarum*  
 & *depopulatores agrorum*, to  
 be omitted in Indictments;  
 and if inserted, yet Clergy  
 not thereby taken away.

37 H. 8. c. 8. Indictment not  
 to be quashed for want of  
 the words, *viz. gladiis, he-*  
*culis, & culellis.*

## 2. At Common Law:

1. Want of certainty vitiates;  
 want of year, day and place.

Indictment for Escape of one taken  
 on suspicion of Felony, without  
 shewing what Felony, *Male.*

Indictment for receipt of a Felon  
 without shewing who received, *Male.*

Indictment *ad magnam curiam &*  
*Letam, Male.*

Indictment for making Alchemy  
*ad instar pecunie Regis*, without  
 shewing what money, *Male.*

Indictment *quod communis male-*  
*factor*, without shewing wherein,  
*Male.*

Indictment *quod cepit*, or *furdit*  
*est;*

est, without saying *felonice*; *abduxit equum*, without saying *cepit*; or *car-naliter cognovit*, without saying *Ra-puit*; or *burgariter*, when it should be *Burglariter*; or if Felony before Justice of Peace, without saying *normen ad diversas felonias*, &c. or before the Mayor of London without saying & *Cerematore*; or of a mur-ther with a Gun, without saying *percussit*, Male.

Indictment supposing the stroke 1. *Augusti*, death 2. *Augusti*, & sic *felonice* *murdravit* 1. *Augusti*, Male. But sic *murdravit* made & *forma præd.* or *præd* 2. *Augusti*, Bene.

Indictment *quod dedit mortalem plagam circa pectus*, Male: but in *sinistra parte ventris circa umbeli-cum*, Bene.

Indictment *de morte cujusdam ignoti*, or *felonice cepit bona*, &c. cu-jusdam *ignoti*, or *domus* & *Ecclesie*, in time of vacation: good.

Indictment of Poysoning with C. P. c. 62. several sorts of Poyson, without shewing of which he died: good.

# Indictments.

## 6. Proof upon Indictments:

In case of Treason and Misprision by the *Stat. 1 E. 6. c. 12. & 5 E. 6. c. 11.* there ought to be two lawfull Accusers, that is, witnesses upon every Indictment.

**C. P. C. 24.** An Accuser by hearsay is no lawfull Accuser within this *Statute*.

The necessity of such proof upon Indictment of Treason is not taken away by *Stat. 1 E. 1. 2. 1 & 2 Ph. & Ma. c. 11.* but onely in the case of counterfeiting Coin.

**St. P. C. 164.** But these Witnesses need not be present with the Indictors, but they may send it to them in writing.

*Process.*

## Process.

**N**OW we come to those Proceedings that for the most part are common both to Appeals and Indictments. And

### I. Of Process.

1. Upon an Indictment or Appeal of Death but one *Capias*, and then *Exigent*: but in case of Robbery, then by Stat. 25 E. 3. c. 14. two *Capias*'s, then *Exigent*; but this Stat. extends not to death.
2. But Indictments or Appeals of Treason, or any Felony, or Trespass against a person of another County after one *Cap.* a second *Cap.* with Proclamations, shall be granted to the Sheriff of that County wherein he is supposed to be conversant before an *Exigent* shall issue by Stat. 8 H. 6. c. 10. And

P

upon

## Process.

upon this *Statute* Process shall go to a County Palatine; and if in the Indictment he be styled *nuper de D.* and so in several Counties, the second *Cap.* shall go to every County.

S. PC. f. 67.

3. In Appeal or Indictment against *Principal and Accessory*, by *Stat. W. 1. c. 14.* Process of Utlary must stay against Accessory till Principal attain.

But if it be an Appeal *by Writ* which is general till Declaration, the Plaintiff must at his peril distinguish the Process; for if he take his *Exigent* against all, he must Count against all as Principals.

An Appeal against *divers*, one appears and pleads to the Writ, or in Barr, which goes to all, Process of Utlary shall stay against the rest till Plea determined.

An



An Indictment or Appeal may be removed in *B. R.* by *Certiorari*, but it must accord with the Appeal.

Upon an Appeal removed by *Certiorari*, the Plaintiff is without day; and to compell the Plaintiff to proceed, the Defendant may take out a *Scire-Facias*, and upon two *Nibils* or a *Scire Feci*, and default, Defendant discharged.

But the Plaintiff upon such Appeal removed, may have *Capias* & *Exigent*.

If the Defendant comes in by *Capias*, and after appearance make default, a new *Capias*; if upon *Exigent*, a new *Exigent*; and upon second appearance shall plead *de novo*, for the first Issue and Inquest is *sine die*.

you being to be arraigned at  
 the Court of the King's Bench  
 at the next Assizes.

## Arraignment.

What manner of Arraignment is to be made?

1. **I**N what manner a Person is to be Arraigned?

The Prisoner, at the time of his Arraignment ought not to be in Irons.

2. Where arraigned upon several Appeals or Indictments.

If a man be indicted or appealed of Robbery or Death at the Suit of one, he shall be Arraigned and Tried at the Suit of another, because they have several interests in the Judgments.

And now the same Law is of an Indictment of Robbery, because by Stat. 21 H. 8. c. 11. the party is to have Restitution.

But if the Appeal by one be not commenced till after an Attainder at the Suit of another, he shall not be Arraigned upon the other Suit;

But if the first Attainder be pardoned, he shall be Arraigned upon the

the

## Arraignment.

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the second Appeal commenced after the Attainder.

But after an Attainder of Felony, he may be Arraigned for Treason for the King's Interest.

By the Common Law, a Clerk convict should have answered all Felonies, and were acquit or convict at the Suit of others.

But this was remedied by *Stat. 25 E. 3. c. 4. pro Clero*. And therefore after that *Stat.* the Clerk convict and delivered to the Ordinary, was discharged of all former Felonies whereof he was not Arraigned before Clergy; and that although those other Offences were not within Clergy. *Dyer 214.*

But now by *Stat. 8 El. c. 4.* after Purgation, and *18 El. c. 7.* after burning in the hand, he shall be put to answer former Felonies upon Appeal or Indictment. *Vid. infra in auterfoits acquit & convict.*

### 3. Concerning the Arraignment of Principal and Accessory.

P 3

1. Who

**Arraignment**

1. Who shall be said an Accessory  
before,  
after.
  2. How the Proceeding shall be  
against them upon their Arraign-  
ment.
- 

*Prin-*

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## *Principal and Accessory.*

### I. **W** H O an *Accessory* ?

1. In Treason no Accessories, but all Principals; But a C.P.C. l. 138. Procurer before, or a Receiver knowingly after, is guilty as Principal in High Treason.
2. Where an Act of Parliament makes a Felony, it doth incidently make such Accessories as would be Accessories C. P. C. l. 59. before or after to a Felony at Common Law; as in Case of Buggery, Rape, &c.
3. The Accessory cannot be guilty of Petit Treason where the Principal is but Murther.
4. If divers come to commit an unlawfull act, and be present at the time of Felony committed, though one of them onely doeth it, they are all Principals.

So if one present move the other to strike: or if one present did nothing, but yet came to assist party if need; or if one hold the party while the Felon strikes him; or if one present deliver his weapon to the other that strikes; for they are *præsentes, auxiliantes, abettantes, or confortantes*.

S. P. C. f. 40.

But if one came casually, not of the Confederacy, though he hindered not the Felony, he is neither Principal nor Accessory, although he apprehend not the Felon.

5. In some cases a person *absent* may be Principal.

4 Rep. 44.  
Vauxe's Case.  
C. P. C. 138.

1. He that puts poison into any thing to poison another, and leaves it, though not present when taken: And so it seems are all that are present when the poison is so infused, and consenting thereto.

2. If upon the same Ground, or in the same House, though not within view of the Fact, when many come

## Principal and Accessory.

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come to doe an unlawfull act: See before Lord *Dacre's Case*, and *Pudsey's Case* in Murther and Robbery.

3. By special Act of Parliament, as upon the *Stat. 3 H. 7. c. 2. 8 H. 6. 12.*

2. Accessories *before*; he that commandeth or assenteth to the committing of a Felony, and is absent when done.

1. In Manslaughter there can be no Accessory before, because done without premeditation. 4 Rep. *Birb's Case*.

2. Where the Execution varies from the Command in the person slain; as a command to kill *A.* and he kill *B.* or in the nature of the Offence; as Command to rob *A.* as he goes to Market, and he break open his House and robs it, the Commander is not Accessory. C. PC, f. 57.

3. But a command to poison *J. S.* and he shoots him; a command to rob or beat *J. S.* and he beats him to death, the commander Accessory.

4. If *A.* command *B.* to kill *C.* and before the Fact *A.* repents, and  
court.

countermands his command, yet *B.* kills him, *A.* is not Accessory.

5. If *A.* poison an Apple, and deliver it to *C.* to deliver to *D.* *C.* not knowing delivers it, Murder in *A.* but no Offence in *C.*

### 3. Accessory after.

St. P. C. 41.

1. A receipt of stolen Goods makes not Accessory, unless he receive Thief. *Ou receive le biens a auter felon.* 9 H. 4. 1.

2. Every Receipt to make an Accessory must be knowing him to be such.

But if a man be attaint of Felony in the County of *A.* the Law presumes notice thereof in the same County: therefore the Receipt of him in the same County seems Accessory; *Contra* if in another County. *Videtur cognitio requisita in utroque.*

3. Receipt of a Felon, that hath given bond to appear at Sessions, &c. not Accessory.

4. Relieving a Felon with Money, victuals, Horse for his journey, know-



knowing, Accessory: but if he be in Prison then lawfull. *Dal. c. 108.*

5. A Brother receiving his Brother may be Accessory, or a Husband his Wife, but not the Wife of her Husband.

6. A man may be Accessory to an Accessory: And

The same man may be Principal and Accessory where Felony done by divers.

7. But sending a Letter in favour of a Felon, instructing him to reade, advising to labour witnesses not to appear, not revealing a Felony intended, permitting a Felon to escape without Arrest, makes no Accessory: *Mes contempt.*

8. Accessory cannot be unless a Felony committed; therefore *A.* wounds *B.* dangerously, *C.* receives *A.* then *B.* dies, *C.* is not Accessory.

9. Si felon vient al meason J. S.  
 que suffer lui d' aler hors nest Felony  
 nisi prist mony ou autre chose pur lui  
 suffer escape. 9 H. 4. 1.

---

*Arraign-*

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# Arraignment of the Principal and Accessory, and things Observable therein.

1. IF the Principal be acquitted, S. P. C. 47.  
or be convict onely of Man- C. PC. 139.  
slaughter, or *se Defendendo*, or be- 4 R. Sayer's  
fore Attainder hath his Clergy, or Case.  
be pardoned, or die, the Accessory  
shall not be Arraigned; otherwise if  
after Attainder.

2. If the Principal be attaint at S. PC. 47.  
the Suit of the King, the Accessory  
shall not be Arraigned at the Suit of  
the party. *Iffint fr soit attaint d' au-*  
*ter felony.*

3. If Principal stand mute, Ac-  
cessory not Arraigned. *V. Contra*  
2 R. 3. 22. 3 H. 7. 1.

4. The *Exigent* shall not go out St. PC. 45.  
against Accessory till Principal at-  
tain by *Stat. W. 1. c. 14.*

5. Where

## Arraignment of, &amp;c.

5. Where Principal appears not, Accessory shall be put to answer: but he shall not be tried till Principal attaint or appear, unless he will, for he may wave the benefit of the Law.

St. P. C. 47.

Com. 100.  
*Orrin's Case.*

6. If he be indicted as Accessory to two, and one of the Principals appears and is convicted, the Court may, if they please, try the Accessory; and if he be found Accessory to him that is attaint, he shall be condemned; if not found Accessory to him, yet he may after be Arraigned as Accessory to the other when he appears.

C. W. 1.  
c. 14.

7. If Principal and Accessory appear and plead to the Felony, they may be tried by the same Inquest; but the Principal must be first Convicted, and have Judgment, before Judgment against Accessory, and the Jury shall be. [Charged] that if they find Principal not guilty, they shall find the Accessory not guilty.

8. If Principal be Erroneously Attainted, yet Accessory shall not take

take advantage thereof, but be Arraigned.

9. If Murther or other Offence were in one County, and Accessory in another by *Stat. 2 E. 6. c. 24.*

1. If Accessory be in *Middlesex*, *C. P. C. p. 49.* where the King's Bench sits, and Principal in another County, the King's Bench may try the Accessory.

2. Certificate in such case shall be upon a *Certiorari* or Special Writ, if need be, formed upon the Matter, and not by Precept, under their Seals, in their own Names. *Ibid.*

3. The High Steward is within the Act.

*Accessory al Petit Larceny. 3 Cr. 750. nemy al Homicide per infortun. 15 E. 3. Coron. 116.*

*Novel felony fait per Stat. videtur null Accessory nisi specialment enact. que. V. Dy. 88. Stam. 44.*

*Vi. pur Trial d' Accessory in foreign County. 2 E. 6. cap. 24 Dy. 253.*

*Acquis*

## Arraignment of, &amp;c.

*Acquit come Principal nemy arrain  
come Accessory: mes acquit come Ac-  
cessory arrain come Principal.*

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*Mute*

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*Mute, Paine fort & dure.*

V. Stat. West.  
1. cap. 12. &  
de inquiry  
de offence  
dnt' Pain fort  
& dure.

**N**OW we come to the Demeanor of the Prisoner upon his appearance :

And thereupon either,

1. He stands mute.
2. He pleads.
3. Or he confesseth the Fact.

1. What said a *standing mute* ?

This of two kinds :

1. When he answers nothing at all : and then it shall be enquired whether he stand mute by malice or by the act of God.

C. West. 1.  
C. 12.  
S. PC. f. 150.

If it be by the act of God, then the Felony shall be enquired of, and whether he be the same person, as if he had pleaded not guilty.

If by malice, or if the Prisoner hath cut out his own tongue, then he shall have Penance.

*Nota, Si ad unfoits pled al Felony*

*Q*

*licet*

C. 6

*licet apres estoit mute, ser. trie. 15 E.*

4. 33.

*Viez Pere estoit mute aver. Penance. 7 Car. Lord Castlehaven's Case.*

2. When he pleads, but not effectually; as when he answers not directly to the Fact, or concludes not upon the County, then if the cause be probable, he shall be put to his Penance. *C. P. C. p. 227.*

*Nota, Si Chall. ultra 35. Standing mute. V. C. PC. fo. 227.*

2. What the consequent of standing mute? 1. *forfeit biens. 14 E. 4. 7.*

1. In Treason it is a Conviction.

2. After Attainder and ask't what he can say why no Execution, standing mute he shall be Executed.

3. In Appeal standing mute, Judgment against him to be hanged. *Contra. 14 E. 4. 1.*

4. Upon *Stat. 33 H. 8. c. 2.* of Felony within the Verge, Offender standing mute Judgment against him.

5. But



**Mute, Paine fort & dure. 227**

5. But in other cases of Felony,  
*Paine fort & dure*, and forfeits  
Goods.

1. Remanded to Prison.
2. Lie naked in some dark Room  
with hands and legs extended.
3. Weights increased.

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**Q<sub>2</sub> Pleas,**

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## *Pleas.*

**I**F the Prisoner plead, it is either  
1. Declinatory.

Sanctuary.

Clergy.

2. Or to the Felony :

1. Demurring.

2. Pleading in Barr.

3. Pleading the general  
Issue.

*Declinatory Exceptions.*

1. *Sanctuary* and the Consequents  
*Abjuration* ousted by *Stat. 21 Jac.*  
c. 28.

*Clergy.*

## Clergy.

2. **C** *Lergy* wherein
1. Who shall have benefit of Clergy?
  2. In what Cases?
  3. At what time?
  4. Who the Judge?
  5. What the Consequent?

1. *Who* shall have Clergy, and who not?

1. A blind man shall not have his Clergy. *Nec Jew, nec Turk: contr. de Greek ou home excommeng'.*
2. A Woman cannot have the benefit of Clergy.

Provision by *Stat. 21 Jac. c. 6. C.P.C.c. 124* that for stealing Goods under 10 s. without Burglary or Robbery, &c. shall be burnt in the hand for the first Offence.

3. Bigamy ousted of Clergy by *Stat. de Bigamis 4 E. 1.* but restored to it by *Stat. 1 E. 6, c. 12.*

Q 3

*Cestuy*

## Clergy.

*Cestuy que abjure aver. Clergy apres son retourne.* 8 H. 8. Kel. 186.

*Cestuy que ad unfoits Clergy naver. auterfoits nisi deins orders,* 4 H. 7. c. 17.

2. *In what cases?* some things premised in general.

1. By Stat. 25 E. 3. c. 4. *pro Clero.* Clergy allowed in all Treasons or Felonies, except Treason against the King; so that alter that Statute, there was Clergy in all Cases but

{ Treason,  
{ Sacrilege.

2. Consequently wheresoever Clergy is not allowable in any other cases, it is taken away by some Act of Parliament.
3. Consequently where any Felony is made by a new Stat. Clergy is to be allowed, unless expressly taken away,

4. Con

4. Consequently whereby any special Act of Parl. Clergy is taken away in any Offence, the Indictment ought to bring the Case within the *Statute*. As upon the *Stat. 3 & 4 Ph. & Ma. c. 4.* the Indictment must run *Malitiose*; so upon *Stat. 8 El. c. 4.* it must be *clam & secrete*; in case of Murther, *ex malitia præcogitata*, otherwise Clergy allowable.
5. Consequently a *Statute* taking away Clergy from the Principal, doth not thereby take it from the Accessories before, unless specially provided for.
6. Where Clergy is allowable, it is to be allowed though the party be Convict by Confession, Verdict, or stands Mute, or challenges peremptorily above 35.

Q4

2. Par-

## Clergy.

2. *Particular Offences* where Clergy, and where not.

1. High *Treason* no Clergy.

2. In Petit *Treason*.

Principal oust of Clergy if convicted by Verdict or Confession by *Stat. 23 H. 8. c. 1.* revived by 5 & 6 *E. 6. c. 10.* and by *Stat. 25 H. 8. c. 3.* though standing Mute, not directly answering, or challenging above twenty.

Not oust of Clergy in Appeal, unless Convict by Verdict or Confession.

Accessories before the Fact maliciously, oust of Clergy in all cases by 4 & 5 *Ph. & Ma. c. 4.*

3. Wilfull *Murther* of Malice prepenſe, Principal oust of Clergy in all cases by *Stat. 23 H. 8. c. 1. 25 H. 8. c. 3. 1 E. 6. c. 12.*

Accessory before maliciously, ousted in all cases by 4 & 5 *Ph. & Ma. c. 4.*

4. *Arſon*

4. *Arson* of Houses, or Barns full of Corn, Principal oust of Clergy in all cases, viz. *sur* Conviction by Verdict, or Confession, by 23 *H. 8. c. 1.* upon standing Mute, not direct answering, challenge above twenty, by *Stat. 25 H. 8. c. 3.*

But Utlary stands subject to Clergy.

Accessory ousted of Clergy in all cases by 4 & 5 *Phil. & Ma. c. 4.*

5. Simple *Burglary.*

Principal ousted of Clergy if utlawed, Convict by Verdict, or Confession.

Not ousted if stand Mute, challenge above twenty, or not directly answering.

Accessory before or after not oust of Clergy.

6. *Burglary*, any person being in the House, or put in fear or dread.

Prin-

## Clergy.

Principal oust of Clergy in all cases, viz. by Stat. 1 E. 6. 12. in case of any Conviction or Attainder; and by 25 H. 8. c. 3. revived by 5 & 6 E. 6. c. 10. it takes away Clergy where above twenty challenged.

But Accessories not ousted of Clergy.

7. Robbery, which hath several Qualifications, with these Considerations:

1. From the Person

Without putting in fear, but *clam & secrete*: by Stat. 8 El. c. 4. Principal in all cases oust of Clergy, Accessory not oust.

With putting in fear, Robbery in or near the High-way.

1. Principal in all cases oust of Clergy, viz. if Appeal or Indictment by 23 H. 8. c. 1. Convict 23 H. 8. c. 1. Attaint 1 E. 6. c. 12. Mute, Challenge above twenty by Stat. 25 H. 8. c. 3. revived by 5 & 6 E. 6. c. 10.

2. Ac-



2. Accessory before oust of  
Clergy in all cases by 4 &  
5 *Pb. & Ma. c. 4.*

2. From Dwelling House; and  
this of three kinds:

1. Owner, Wife, or Servants  
being in the House, or put  
in fear, here Clergy.

1. As to Principal, taken away  
by 23 *H. 8. c. 1.* in case of  
Conviction by Verdict, or  
Confession, and by 25 *H. 8.*  
*c. 3.* revived by 5 & 6 *E. 6.*  
*c. 10.* in case of standing  
Mute, challenge *ultra* twenty,  
not directly answering:  
Also to a Conviction in a  
foreign County, if it appear  
by Examination not to be  
within Clergy in the same  
County.

2. Accessory in all cases oust of  
Clergy by *Stat. 4 & 5 Pb.*  
*& Ma. c. 4.*

*Nota,* A Stranger in the House  
brings it not within Sta-  
tute.

2. Rob-

## Clergy.

2. Robbing any person by day or night, any person being in the same House, and put in fear.

Principal oust of Clergy by 1 E. 6. c. 12. in all cases, but challenging twenty; and by Stat. 5 & 6 E. 6. if in a foreign County Clergy upon Examination taken away.

Accessories, Clergy taken away by 4 & 5 Ph. & Ma. c. 4. in all cases.

3. Robbing any person in his Dwelling House, the Owner, his Wife, or Children being in any part of the House, or within the precincts thereof; though there be no putting in fear. And this extends to Booths in Fairs.

Principal oust of Clergy by 5 & 6 E. 6. c. 9. in case where the Offender is found guilty.

Print.

Principal thereof in other cases shall have Clergy; as in standing Mute, challenge *ultra* twenty.

Accessory oust by *Stat.* 4 & 5 *Ph. & Ma. c. 4.*

4. Robbery to the value of 5 s. out of any Dwelling-house or Out-house thereunto belonging, though none in the House, by *Stat.* 35 *El.*

Principal oust of Clergy in case of Conviction, not of standing Mute.

Accessory shall have Clergy.

*Un enter in le lodging Sir H. Hungate parcell de Whitehall, nul person esteant in lodging, mes in autre part de Whitehall & infreint un chamber & prist biens : Rule per advise de Justices, 1 L' Indictment doit estre pur infreindre de meason de Roy vocat' Whitehall & pur Embleer les biens Sir H. H. divers persons esteant in le meason : Car nient semble al Chamber in Inne de Court, lou chescun ad several property. 2. Que ceo fuit diens le Stat. 5 & 6 E. 6. & L' Enditement la accordant. 3. Que in Inditement*  
*Cur*

*sur Stat. 23 H. 8. vel 5 & 6 E. 6. doit estre actual breaking & auxi Robbery. 4. Que si laron enter in meason le doores open, & infreint Chamber, & prist biens, est deins le Stat. 5 E. 6. d' ouster luy de Clergy.*

8. *Larceny without any of these Circumstances.*

*Horse-stealing oust of Clergy, by 1 E. 6. c. 12. 2 & 3 E. 6. c. 33. Principal oust in all cases;*

*Accessory ousted in no cases.*

*But other Larceny, not being Robbery nor Cut-purse, have Clergy.*

9. *In Rape, Clergy oust by Stat. 18 El. c. 7.*

10. *Though the Offence be within Clergy, yet if he had formerly his Clergy, and were burnt in the Hand, the Stat. of 4 H. 7. c. 13. ousts him of Clergy, unless he were a person in Orders, and then he must produce his Certificate presently, or by a time prefixed.*

*And see the Stat. 34 & 35 H. 8. c. 14. for the manner of the Certificate of such Convictions and other Attainders.*

And

And though *Stat.* of 32 *H. 8. c. 1.* hath put men in Orders in the same condition with others, in reference to Clergy; yet as to this point of the *Stat. 4 H. 7.* the clause of the *Statute 1 E. 6. c. 12.* doth give a person in Orders his Clergy the second time in all cases, but in case of 1. Challenge above twenty;  
2. Outlary.

3. *When Clergy shall be allowed.*

1. Now the use is not to put the party to challenge his Clergy till he hath pleaded, and the Inquest thereupon taken:

1. For advantage of the *St. P. C. 131.* party, if acquitted.

2. For advantage of the King for forfeiture, if Convict.

2. It may be allowed in Discretion, though the party challenge not.

Allowed under the Gallows, or where Judgment of *paine fort & dure* given, or where challenge above twenty.

V.

## Clergy.

V. *Crom. Jur.* 126. *Allow South Gallows per Just. B. R. mes nemy Gaol Delivery: mes poent apres Judgment devant adjournment, Dy.* 205.

*Licet Ordinary retorn non legit, & est record, & re pry al autre Sessions, & tunc legit, avera benefit de ceo, Dy.* 202. 34 H. 6. 49. *Coron.* 20.

## 4. The Judge.

The Ordinary is but Minister, the Judge at Common Law is the Judge when and where to allow it, and of the Reading, 9 *E.* 4. 28. *Coron.* 32.

## 5. What the Effect of Clergy allowed :

1. In ancient time the Consequent was delivery to the Ordinary, either to make Purgation, or *absque Purgatione*, as the case required.

But by *Stat.* 18 *El.* c. 7. now onely burnt in the Hand, which hath these effects;

1. Enables the Judge to deliver him out of Prison; but yet if he see cause, he may detain him till he find Sureties of good behaviour :

And

And by the Stat. 3 H. 7. c. 1.

If Clergy within the year,  
he is to be bailed or com-  
mitted at discretion, till the  
year past.

2. It gives him a Capacity to  
purchase Goods, and retain  
the profits of his Lands.

*Foxley's Case,*  
5 Rep.

But the Goods he had at the  
time of the Conviction are  
forfeit.

3. It restores him to his Cre-  
dit. *Hob. 377. Searle's*  
*Case.*

*Le Stat. 25 H. 8. que toll Clergy  
del persons arrain in forrein County sur  
examination extend solment al tiels  
felonies d'ont Clergy oust per. Stat.  
23 H. 8. & nemy per subsequent Stat.  
Et par ceo rule in Anne Coles Case;  
Si feme infreint meason in County de  
S. in day time, & prist biens South  
value de 10s. & eux import in Coun-  
ty de D. & la arraigne, el serra arse  
in maine: quia nul mister in pavor  
come require per le Stat. 23 H. 8.*

*Robbery de value de 10d. & import  
in forrein County & la arrain est Pe-*

R

tut

## Clergy.

*est Larceny. 2 Jac. Moores Rep. quia  
Le Stat. 23 H. 8. extendit folment al  
ceftuy que demand Clergy, que neft  
in cafe de Per. Larceny.*

*Indite de Robbery in quadam via  
pedestri, auera Clergy: Car le Stat.  
parle de Robbery in vel prope altam  
viam regiam. T. 38 Hen. 8. Moore 5.*

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*Pleas*

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## *Pleas to the Felony.*

### 1. **D**Emurrer.

2. Pleas in Abatement and Barr.
3. The General Issue.

#### 1. For *Demurrer*.

It amounts to a Confession of the C. West. 1.  
Indictment, as laid; and therefore C. 12.  
if the Indictment good, Judgment  
against the Prisoner, and Execution.

#### 2. For Pleas *in Abatement*.

If Prisoner plead *Misnomer* of his St. PC. 181.  
Surname unto an Appeal, it goes in. 1 H. 5. 5.  
Abatement; But in case of Indict-  
ment he shall be put to answer the  
Treason or Felony.

But *Misnomer* of the Christian  
Names goes in Abatement; and if  
it be confessed by the King's Attor-  
ney, or found, the Indictment falls.

11 H. 4. Coron. 88.

But then he must give his true  
Name, and by that Name he may  
be forthwith Indicted.

R 2

*Pleas*

# Auterfoits Acquit.

*Pleas in Barr.*

*Auterfoits acquit.*

*Auterfoits acquit :*

1. If a person be acquitted upon an insufficient Indictment or Appeal, yet upon a new Indictment he may be arraigned for the same Felony. *4 R. Vaux's Case, licet Judgment done.*

S. PC. f. 105,  
106.

2. *Auterfoits acquit* of one Felony, no Barr to an Indictment or Appeal of another Felony, &c. though committed before the Acquittal.

3. *Auterfoits acquit* as Principal, no Barr to an Indictment against him as Accessory to the same Felony after ; But it seems he cannot be after Indicted as Accessory before. *Stamf. 105.*

4. In an Appeal of Death or other Felony, *Auterfoits acquit*, upon an Indictment for the same Felony, was a good Barr in all Cases ; therefore  
if

## **Auterfoits Acquit.**

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if an Appeal was pending, the Court would surcease the Arraignment of the Prisoner upon an Indictment till it was determined: Or though no Appeal pending, yet in case of death, would surcease till the year past.

But at this day *Auterfoits acquit* in an Indictment of Death no Barr to an Appeal, by *Stat. 3 H. 7. c. 1.* for the Prisoner notwithstanding the Acquittal; but in other Appeals it stands a Barr to an Appeal.

5. But *Auterfoits acquit* in an Appeal, Barr to an Indictment of the same Felony.

1. Unless the Appeal be Erroneous in substance.
2. Or unless the Appeal be by a wrong Person.
3. Unless the Acquittal be by Battel; for in these cases he may be indicted again.

6. He that pleads this Plea, need not have the Record *in poigne*, because it goes in Barr. 3 *E. 3. B. Coron. 217.*

R 3      7. Though

## Auterfoits Acquit.

7. Though there be *Variance* between the Indictment, &c. yet if it be such as may admit an *Averment*, to be the same, yet it may be pleaded.

Variance in the *Name* if *Conus per un name & auter*.

Variance in the *day* of Felony supposed to be committed.

Variance in the *place*, but by the Opinion of 4 *H. 5.* acquit of Larceny in one County no Barr in another.

*Variance in L'offence auterfoits acquit, attaint de Murther ou Manslaughter turr. Pet. Treason.*

---

*Auter-*

*Auterfoits Condict or Attaint.*

1. Where a Barr to the same Felony.

1. *Auterfoits attaint* of the same Felony in an Appeal Barr to an Indictment; for the Effect is obtained, the death of the party; But *vid.* no Barr in Appeal. C. P. C. 213.

2. *Auterfoits condict* by Verdict or Confession of Manslaughter in an Indictment and had Clergy, Barr in Appeal, though it be of Murther, for the fact the same in both, though the offences differ in degree. 4 Rep. 45.  
Wigg's Case.

*Auterfoits acquit sur insufficient enditement, & nul Judgment done, nest plea: mes auterment est si Judgment soit done tanque ceo revers.* *Vauxe's Case*, 4 Rep.

2. Where a Barr to an Arraignment for another Offence.

S. P. C. 107.

1. *Auterfoits attaint* of Felony is no Barr to Arraign him of Treason committed before the Felony for the King's Interest.

C. P. C. 213.

And it seems if the Treason was committed after the Felony, then he shall be Arraigned of the Treason, for the Offence is different.

2. *Auterfoits attaint* of one Felony Barr to an Arraignment of Felony: but this hath these *Exceptions*:

1. Where the *first* Attainder is pardoned, ~~where~~ he may be Arraigned for the former Felonies though committed before.

S. P. C. 66.  
107.

2. In case of Appeal he shall be Arraigned at every one of their Suits, notwithstanding he be Attaint at one Suit.

The like it seems upon indictment of Robbery, because by the *Stat.* the party is to have restitution.

3. *Auter-*

3. *Auterfoits convict*, and had Clergy after *Stat. 25 E. 3. c. 5.* had been a Barr to an Arraignment for another Felony, though not within Clergy. *Dy. 214.*

But now by *Stat. 8 El. c. 4.* after Purgation, and *18 El. c. 7.* after burning in the Hand, he shall be put to answer former Felonies not within Clergy, or for any offence after Clergy allowed.

And Note, that he that pleads a Plea in Barr to an Indictment or Appeal that confesseth not the Felony, shall plead over to the Felony; otherwise if it confess the Felony; as Pardon, or Release.

*Pardons.*

## Pardons.

### 3. **P**ardons

Are either of *Course* and *Right*; such are:

1. For a person Convict of Murder, or *se defendendo*.

St. P.C. 102.

2. An Approver that vanquisheth the Appellee.

### Pardons of *Grace*.

1. Some things requisite to their allowance *by Statute*.

1. By *Stat. 13 R. 2, c. 1*. Pardon of Murder, Rape, or Treason must be especially expressed in the Pardon, otherwise it ought not to be allowed in such cases. *Vide si extend al Petit Treason & Accessories. 22 E. 4. 19. Lam. 293.*

2. By *Stat. 10 E. 3. c. 2*. there must be Surety of good abearing, otherwise the Charter void; but a special *Non obstante* may prevent it.

2. Matter



2. *Matter at Common Law* considerable.

1. Charter of Pardon no Barr of an Appeal: and if the party be outlawed in Appeal, and the King pardon, he shall have a *Scire Facias* against the Appellor, who may pray Execution notwithstanding such Pardon; but if returned *Scire feci*, and appears not, then Appellee shall upon the Pardon be discharged.

2. Pardon of all Felonies is no Barr to Execution, if the Felon be Attaint; yet an Exception of all Burglaries excepts the Burglary for which the party is Attainted.

3. Pardon of all Attainders not good with a Pardon of the Felony.

4. The Pardon of Felony reciting in the Pardon that the party is Indicted, and in truth he is not, this is void.

5. The

C. PC. 337.

5. The King may Pardon the burning in the hand in Appeal, & l'imprisonment per cœa discharge.

6. Sil apres infreint Peace Scire fac. gist a repealer le Pardon, & ser. pendu pur primer offence per le Stat. 10 E. 3. 3 H. 7. 7. viz. nisi soit non obstante le Stat.

7. Pardon de tout Felonies per A. & B. vel cor. alter. commit. pardon several, Dy. 34. 22 E. 4. 7.

### Pleading the Pardon.

He that pleads a General Pardon by Parliament, wherein are Exceptions, must averr that he is none of the persons excepted.

But of a General Pardon by Parliament without Exception the Court *ex Officio* must take notice.

He that pleads a Particular Pardon,

1. Must shew it under Seal.
2. Must have a Writ of Allowance, *q'il ad trone Surety som.* Stat. 10 E. 3.

Mes

*Mes lou nul brief d' allowance nul  
mort, 5 E. 4. 132.*

3. If variance he must averr that  
the same person.

**General**

## General Issue.

**T**HUS far of Pleas in Barr upon Indictments or Appeals; now we come to *Pleas to the Fact, Not Guilty.*

1. Regularly he that pleads any special matter in Barr in Cases Capital, that confesseth not the Felony, notwithstanding the Plea found against him, the Felony shall be enquired of, and therefore he shall plead over to the Felony.

2. The immediate *consequent* of this Plea is *Trial*; and that is either

By the Countrey.

By Peers.

By Battel.

*Trial*

## *Trial per Patriam.*

1. **C**ONCERNING Trial *per patri-*  
*am*; and therein,

1. Where Issues tried.
2. What Proceſs againſt Jury.
3. Before whom.
4. Challenge.
5. Evidence to be given.
6. Verdict.

1. *Where* tried.

1. For Trial of *foreign Treasons* and foreign Accessories, or stroke in one County, and death in another, *v. supra* in Indictments.

2. For Trial of *foreign Pleas* by Stat. 22 H. 8. c. 14. made perpetual by 32 H. 8. c. 3. Foreign Pleas pleaded by a person indicted of Felony, and Triable by the County, shall be tried where the party is Arraigned; but it is now in Treason triable in the foreign County by virtue of Stat. 1 & 2 Ph. & Ma. c.

2. *Pro.*

2. *Process against the Jury.*

1. *Nota*, The Justices of Gaol Delivery have their Pannel returned by the Sheriff, without any Precept, by a bare Award; but Justices of Oyer and Terminer not.

2. By good *Opinion*, the Justices of Peace, or Oyer and Terminer, cannot make their *Venire Facias* to try an Issue retornable the same Sessions; but Justices of Gaol Delivery clearly may.

3. If several persons Arraigned upon an Indictment or Appeal, and they severally plead Not Guilty, the Plaintiff may take out one *Venire Facias*, or several.

4. If the *Venire Facias* be joynt, Challenge by one drawn against all.

Crom. 100.

5. Though Pannel be joynt, and *Tales* awarded, yet Court of Gaol Delivery may after sever the Pannel to prevent that inconvenience.

6. In

6. In Appeal, if after Issue Plaintiff tries it not, a *Venire* by *Proviso* may be for the Defendant; yet upon that *Venire* Plaintiff may have a *Tales*.

3. *Tales*.

1. If a full Jury appear not, or be Challenged in Indictment or Appeal, the Plaintiff may have a *Tales*.

2. Upon Indictment or Appeal, because Defendant may Challenge peremptorily, *Tales* may be granted larger than the Principal Pannel, as forty *Tales*, 14 H. 7. 7.

3. But the succeeding *Tales* must be less than the former, unless the first be quashed, and then the same number with that which is quashed.

4. If any of the Jury die before sworn, a new *Tales* grantable.

S

3. Before

3. *Before whom?*

1. A *Nisi prius* not grantable where the King Party, unless prayed by his Attorney.

2. By Stat. 14 H. 6. c. power to Justices of *Nisi prius* to give Judgment in Felony and Treason tried before them.

3. By Stat. 42 E. 3. c. 11. Enquest in Assize and Gaol Delivery may be taken before the Pannel returned in Court, but not in other Cases.

---

4. Chal-



## Challenge.

### 4. Challenge of Array or Polls.

1. *Ex parte Regis* by Stat. 33 E. 1. c. the King shall not Challenge without Cause; but yet he is not compellable to shew the cause till the Pannel perused.

2. *Ex parte prisonarii*, the Challenge is either Peremptory, or upon Cause.

#### 1. Peremptory Challenge.

1. A peremptory Challenge not allowable, but where the life of a Prisoner comes in question, and therefore not upon Collateral Issues.

2. At Common Law he might have challenged peremptorily 35. under three full Juries; and if he challenged above, he should have Judgment to be hanged, 3 H. 7. 12.

But by Stat. 22 H. 8. c. 4. made perpetual, by 32 H. 8. c. 3. it is reduced to 20; and now if he Challenge above 20, he shall not be therefore hanged, or forfeit, but his

S 2

Chal<sup>d</sup>

CPC. 227.

Challenge Over-ruled, and he put upon his Trial; yet *vid. Statutes, semble contra.*

3. In Case of Treason and petit Treason, the Challenge of 35 restored by Stat. 1 & 2 P. & M. c. 10.

2. Challenge *for Cause*; we mention but three;

1. Cause of *Insufficiencies*. By the Stat. 2 H. 5. c. 3. 40 s. *per Ann.* required in County; but this, as to Aliens, corrected by 8 H. 6. c. ult. in Cities by Stat. 23 H. 8. c. 13. Goods to the value of 40 l.

2. *Unindifferency*.

Indictor not to be of Jury by Stat. 25 E. 3. c. 3.

3. In reference to an *Alien*, & *medietat' lingue*, where

1. In no Case Indictors ought to be *de medietate lingue*.

2. In Treason trial *per medietat' lingue* *repel per Stat.* 1 & 2 Ph. & Ma. *que ad* *repel* 28 E. 3. in that Case.

3. In

## Challenge.

261

3. In Appeal by an Alien against an Alien no *medietas lingue*.
  4. Scot no Alien, to have *medietatem lingue*.
  5. The Jurors need not be of the same Nation, but any Aliens.
  6. He that will have advantage of Trial *per medietatem lingue* must pray it, otherwise he cannot have benefit by way of Challenge. Dy. 304. 357.
  7. *Egyptians* excluded from the Trial *per 1 & 2 Ph. & Ma. c. 4.*
- 

S 3

Evidence

13

## *Evidence.*

### 5. *Evidence to the Petit Jury.*

#### 1. In Case of *Treason*

There must be two Accusers or Witnesses by *Stat. 1 E. 6. c. 12. & 5 E. 6. c. 11.* and this stands notwithstanding, *Stat. 1 & 2 Ph. & Ma. c. 11.* but onely in Case of *Treason* for Counterfeiting Coin.

These Witnesses must not be onely by hear-say.

#### 2. In Case of *Felony.*

##### 1. What allowed as Evidence :

1. By *Stat. 1 & 2 Ph. & Ma. c. 13. & 2 & 3 Ph. & Ma. c. 10.* the Justice hath power to Examine the Offender and Informer.

2. The Examination of the Offender not upon Oath, but Subscribed by him.

3. Examination of others must be upon Oath.

4. This must be certified by the Justices.

1. If

1. If it be but a small Felony, to the Sessions.
2. If it be a great Felony, &c. to the Next Gaol Delivery.
5. These Examinations, if the party be dead or absent, may be given in Evidence.

But Prudence to have the Justice or his Clerk sworn to the truth of the Examinations.

6. But Examinations, taken upon a Cause of Divorce for a forcible Marriage, not allowed to be read upon an Indictment upon 3 H. 7. for the same Marriage.

2. By whom.

1. *Wife*, or her Examination, Dal. c. 111. not to be used for or against her Husband.
2. The Examination of an *Infant* of Thirteen, nay of Nine allowed in some Cases.
3. One Attaint of Conspiracy, Forgery, or Perjury, not allowed a Witness.
- 4 One duly set on Pillory. C. P. C. 219.

S 4

3. In

• 3. In what manner.

1. Evidence for the King always upon Oath.

C. GP. c. 22.

But Evidence for the Prisoner not upon Oath; yet no known Law that restrains it: But by some *Statutes* in some Cases, Evidence for the Prisoner upon Oath, as 31 *El.* c. 4. 4 *Jac.* c. 1.

The Confession of the Offender taken upon Examination, Evidence with Oath not of the Informer.

4. Where Evidence maintains the Indictment.

1. If the Indictment be of a Felony, &c. at one *day*, though the Evidence be of another day, the Jury may find generally against Prisoner, and leave the person that is interested in point of time to falsify; Or the Jury may find the true day upon their Verdict, and then the forfeiture shall relate thither.

C. PC. s. 230.

3. If the Indictment lay the Felony at one *place*, the Evidence proving the Fact at another place in

in the same County, maintains the Indictment.

3. If the Indictment and Evidence differ in *specie mortis*, then it maintains it not: as Indictment of Poisoning, Evidence of stabbing maintains it not.

But if the Indictment be of poy. C. P. C. 135.  
soning with one kind of Poison, and the Evidence of another; or of killing with a Dagger, and 9 Rep. Mack-  
all's Case. the Evidence is of killing with a Staff, yet it maintains the Indictment; for it agrees in substance and kind.

The like of Accessories before, though the Poison or Weapon different.

4. Indictment that *A.* gave the mortal blow, and *B. C.* and *D.* were *presentes & abettantes*; Evidence that *B.* gave the blow, and *A. C.* and *D.* *presentes & abettantes*, yet it maintains the Indictment.

5. Indictment of *A.* as Accessory 9 Rep. Sam-  
shar's Case. to *B.* and *C.* Evidence proves him Accessory onely to *B.* maintains the Indictment.

6. In-

6. Indictment of Murther, *ex malitia præcogitata*; Evidence of malice in Law, as killing an Officer, or without Provocation, yet maintains the Indictment.

7. Indictment upon *Statute* of Stabbing. 21 *Jac.* Evidence that the dead stroke first, yet Evidence to maintain the Indictment for Manslaughter generally. *H. 23 Car. Hornwood's Case.*

8. Two indicted as Principals, Evidence proves one Accessory before he shall be discharged of that Indictment. 26 *H. 8. 5.*

9. *Vid. Stat. 21 Jac. c. 27.* Mother endeavouring to conceal the death of her Bastard-child, shall suffer death as in case of Murther, unless she prove by one Witness that the Child was born dead.

*Vid. Act, 17 Car. in fine,* for the farther Relief of his Majesty's Army in the Northern parts. Act continued till end of next Sessions; continued over till some Act of Parliament for their continuance or discontinuance.

*Verdict.*



*Verdict.*6. **V**erdict in Cases Capital.

1. It must be given, and St. P. C. 163.  
the Jury cannot be discharged till  
it be given.

2. It must be given openly in  
Court, and no privy Verdict.

3. It may be found Specially; as  
an Indictment of Murther, the Jury  
may find him Guilty.

1. Of Manslaughter :

2. *Per Infortunium* :

3. *Se defendendo*.

But then they must find the man-  
ner of it, that the Court may Judge  
thereof; so for the value or the man-  
ner of the Larceny.

*Trial by Battel, Peers.*

**N**OW we should come to Trial  
By Battel.

By Peers: *v.* the whole Pro-  
cess thereof, *C. Pl. Cor.* 27.

*Judg-*

## Judgments in the several Cases.

### I. *In High Treason.*

C. P. C. 218.  
219.

1. In all Cases, except Counterfeiting Coin, Drawn, Hang'd, Entrails taken out and burnt, Head cut off, Body quartered, Head and Quarters hang'd up.

2. In Counterfeiting Coin, Drawn and Hang'd: *Iffint per tonsure.* Dy. 230.

But the Judgment of a Woman in those cases. Drawn and Burnt.

### II. *In Petit Treason.*

1. For a Man, Drawn and Hang'd.

2. For a Woman, Drawn and Burnt.

### III. *In Felony.*

Hang'd till Dead: And this cannot be by the King altered to Beheading.

IV.

IV. *In Petit Larceny.*

To be Whipt.

He forfeits Goods.

V. *Death per Infortunium.*

No exprefs Judgment; yet Forfeits Goods.

VI. *Death se defendendo.*

No exprefs Judgment; yet Forfeits Goods.

VII. *Misprifion of Treafon.*

Forfeits Goods; Forfeits Profits of Land during Life; perpetual Imprifonment.

*Vide* for Seifure of Goods.

1. Not before Indictment.

2. Nor removed before Attainder. 1 R. 3. c. 3.

Fal-

# Falsifying Attainders.

## *Falsifying Attainders.*

1. By the Party, by *Writ of Error*.
2. By others *Falsifying* it.
  1. A Purchaser may falsifie an Attainder of the Vendor by Utlary or Confession in the point, if he Purchase before the Attainder, and after the time of the Felony supposed.
  2. A Purchaser *mesne* between the time of the Felony committed, and the Attainder by Verdict, cannot falsifie in the point of the Offence, but he may for the time.
  3. If the Attainder was by such as had no good Commission, the Party himself may falsifie the Attainder. *Casus Com. Leicest.*
  4. If the Principal Attainted, and then the Accessory and Principal reverse the Attainder, the Attainder of the Accessory is *eo ipso* avoided, and his heirs may have *Mortdanc* against the Lord by *Escheat*.
5. Attain

5. Attaint of Treason, and then the Treason is pardoned by Act of Parliament, the Party or his Heir shall falsifie Attainder.
6. In Case of *Goods*.
  1. *Fugam fecit* found by the Coroner cannot be falsified though upon his Arraignment it be found he did not fly: But if the Indictment be void or insufficient, no Forfeiture.
  2. A man indicted before Justices S. P. C. 184 of Oyer and Terminer, acquit by Verdict, and found he fled, and the particulars of his Goods found, they may be Traversed.
  3. Default till *Exigent*, though after acquitted, Goods Forfeited; for it is a *fugam fecit* in Law.

But if the Indictment, Appeal, or Process insufficient, the Forfeiture saved; so if it be reversed by Error, or pardoned before *Exigent*.

*Nota*, Flight or *Exigent* in case of Petit Larceny, Forfeits Goods.

*Execu-*

## *Execution and Reprieve.*

C. P. C. 212. I.  
217.

**T**HE Execution must be pursuant to the Judgment, and cannot be altered by the King, as from Beheading to Hanging.

2. But King may pardon part of the Execution; as in Treason, he may pardon all but Beheading.

3. It must be done by the proper Officer.

C. P. C. c. 7.  
217.  
S. P. C. 198.

4. If a Woman, Convict of Treason or Felony, be quick with Child, she shall have one Reprieve, but not a second time.

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